Nor Anak Nyawai & Ors v Borneo Pulp Plantation Sdn Bhd & Ors

HIGH COURT (KUCHING) — SUIT NO 22–28 OF 1999–I
IAN CHIN J
12 MAY 2001

Land Law *— Customary land — Claim of — Proof of custom — Iban customary rights — Whether native customary rights exercised continously in disputed area — Need for unambigious words in legislation to exclude existing rights — Whether representative action by plaintiffs for declaration of rights was proper*

This was a representative action taken out on 26 January 1999 by the plaintiffs for themselves and on behalf of 'all other occupiers, holders and claimant of native customary land at Sungai Sekabai, …' against Borneo Pulp Plantation Sdn Bhd ('first defendant') who had been issued titles to two parcels of land, Borneo Pulp and Paper Sdn Bhd ('second defendant') the sublessee of the land and the Bintulu Superintendent of Lands and Surveys ('third defendant'), the authority that issued the titles to the lands. The plaintiffs claimed that they have acquired native customary right over certain part of the lands ('the disputed area') and that the second defendant had trespassed and damaged the disputed area. The issues that the court had to decide were: (i) whether a representative action was suitable in this case; (ii) whether the plaintiffs and their ancestors had exercised those rights continuously in the disputed area; and (iii) whether those rights had been affected to the extent of them being extinguished by any order or legislation throughout the years. The issues in this case call for an examination of the rights of an Iban in relation to the land and its resources to which he has no documentary title.

Held:

(1) The plaintiffs' claim included declarations which made the action a suitable representative action even assuming that the court could not award damages since the court could still grant the declaration if the plaintiffs had established their case (see p 247E–F). If the plaintiffs succeed on the merits of their action, then this is a proper representative action. If the plaintiffs failed, it does not matter whether this is a proper action since the action is going to be dismissed anyway (see p 247G); *Jok Jau Evong & Ors v Marabog Lumber Sdn Bhd* [1990] 3 MLJ 427 followed.

(2) Native customary rights were exercised by the plaintiffs and their ancestors in the disputed area (see p 258B). If the present generation have proven that they had been practising customs which historians described as having been practiced 200 years ago, then that is sufficient proofs that such native customary rights had been practiced 200 years ago (see p 258C–D).

(3) There must be clear unambiguous words to that effect if it was intended that the native customary rights that had existed since

before the time of the First Rajah and that had survived through all the orders and legislation were to be extinguished. Not only there were no such words, neither were there any words that could possibly give rise to such inference (see p 292C).

[**Bahasa Malaysia summary**

Ini merupakan satu tindakan perwakilan yang diambil pada 26 Januari 1999 oleh plaintif-plaintif bagi diri mereka dan bagi pihak 'semua penghuni, pemegang dan penuntut tanah adat masyarakat asli di Sungai Sekabai …' menentang Borneo Pulp Plantation Sdn Bhd ('defendan pertama') yang telah diberikan hakmilik atas dua bidang tanah, Borneo Pulp and Paper Sdn Bhd ('defendan kedua') penerima pajak kecil tanah tersebut dan Penguasa Tanah dan Tinjauan Bintulu ('defendan ketiga'), iaitu pihak berkuasa yang telah memberikan hakmilik kepada tanah-tanah tersebut. Plaintif-plaintif menuntut bahawa mereka telah memperolehi hak adat masyarakat asli atas sebahagian dari kawasan tanah-tanah tersebut ('kawasan yang dipertikaikan') dan bahawa defendan kedua telah mencerobohi dan merosakkan kawasan yang dipertikaikan tersebut. Perkara-perkara yang harus diputuskan oleh mahkamah adalah: (i) sama ada satu tindakan perwakilan sesuai dalam kes ini; (ii) sama ada plaintif-plaintif serta nenek moyang mereka telah menggunakan hak-hak mereka secara berterusan di kawasan yang dipertikaikan; dan (iii) sama ada hak-hak tersebut telah terjejas sehingga takat ianya dipadamkan oleh apa-apa aturan atau undang-undang sepanjang jangka itu. Perkara-perkara dalam kes ini mewajibkan pemeriksaan hak-hak seorang berkaum Iban berkenaan tanah tersebut dan sumber-sumbernya di mana beliau tidak mempunyai hakmilik dokumentari.

Diputuskan:

(1) Tuntutan plaintif-plaintif termasuklah deklarasi yang menjadikan tindakan tersebut satu tindakan perwakilan yang sesuai walaupun jika dianggap bahawa mahkamah tidak boleh memberi award gantirugi kerana mahkamah masih boleh memberikan deklarasi sekiranya plaintif-plaintif membuktikan kes mereka (lihat ms 247E–F). Jika plaintif-plaintif gagal, ia tidak menjadi persoalan sama ada ini merupakan tindakan yang betul kerana tindakan ini akan ditolak akhirnya (lihat ms 247G); *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427 diikut.

(2) Hak-hak adat masyarakat asli digunakan oleh plaintif-plaintif dan nenek moyang mereka di kawasan yang dipertikaikan (lihat ms 258B). Jika generasi kini dapat membuktikan bahawa mereka sedang mengamalkan adat istiadat yang dihuraikan oleh ahli kaji sejarah sebagai adat istiadat yang diamalkan 200 tahun dahulu, ia adalah bukti mencukupi bahawa hak-hak adat

masyarakat asli ini telah digunakan 200 tahun yang lampau (lihat ms 258C–D).

(3) Mestilah terdapat perkataan-perkataan yang jelas jika diniatkan hak-hak adat masyarakat asli, yang telah wujud sejak zaman sebelum pemerintahan Rajah Pertama dan telah dikekalkan melalui semua aturan dan undang-undang, untuk dipadamkan. Bukan hanya tidak terdapat perkataan-perkataan seperti itu, tidak terdapat juga perkataan-perkataan yang dapat memberi maksud tersirat sedemikian (lihat ms 292C).]

Notes

For cases on customary land, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2313–2324.

Cases referred to

Abang v Saripah [1970] 1 MLJ 164 (refd)
Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1997] 1 MLJ 418 (refd)
Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor [1998] 2 MLJ 158 (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209 (refd)
Ara bte Aman & Ors v Superintendent of Lands & Mines, 2nd Division [1975] 1 MLJ 208 (refd)
Aw Kew Lim & Ors v PP [1987] 2 MLJ 601 (refd)
Calder v Attorney General of British Columbia 1973 SCR (refd)
Goh Beng Seng v Dol bin Dolah [1970] 2 MLJ 95 (refd)
Hamit bin Matussin & Ors v Superintendent of Lands & Surveys & Anor [1991] 2 CLJ 1524 (refd)
Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors [1990] 3 MLJ 427 (folld)
Ketua Pengarah Jabatan Alam Sekitar & Anor Kajing Tubek & Ors and other appeals [1997] 3 MLJ 32 (refd)
Ladang Tai Tak (KT) Sdn Bhd v Suppiah a/l Andy Thavar & Ors [1999] 5 MLJ 257 (refd)
Lebbey Sdn Bhd v Chong Wooi Leong & Anor [1994] 3 AMR 2205 (refd)
Mabo v State of Queensland (1992) 66 ALJR 408 (refd)
Mabo (No 2) (1992) 175 CLR 1 (refd)
Nyalong v The Superintendent of Lands & Surveys Second Division, Simanggang [1967] 2 MLJ 249 (refd)
Packiam & Anor v PP [1972] 1 MLJ 247 (refd)
Pang Cheng Lim v Bong Kim Teck & 3 Ors [1997] 4 AMR 3717 (refd)
Petronas Dagangan Sdn Bhd v Omar bin Abdul Samad [1996] 4 MLJ 391 (refd)
Sepid Anak Selir v R (1954) SCR (1954–55) (refd)
Tan Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)

TR Bujang Ak untor v TR Tanjong Ak Usat 4 MC 62 (refd)
Tuong Aik (Sarawak) Sdn Bhd v Arab-Malaysian Eagle Assurance Bhd [1996] 2 CLJ 134 (refd)
Udin bin Lampon v Tuai Rumah Utom [1949] SCR 3 (refd)
Wik Peoples, The v Queensland (1996–97) 187 CLJR 1 (refd)

Legislation referred to

Adat Iban 1993 ss 7(1), 9
Evidence Act 1948 ss 48, 49
Federal Constitution arts 5(1), 13, 161A
Fisheries (Adoption) Ordinance 1994
Forests Ordinance (Cap 31) 1934 s 55(1)
Forests Ordinance 1953 s 65(1)
Forest Rules 1947
Game Ordinance 1947 (Cap 35)
Interpretation Order No 1–1 of 1933 ss 1(3), 66(a), (b), (c)
Land (Classification) Ordinance 1948 s 8(3), (4)
Land (Classification) (Amendment) Ordinance 1954
Land Order 1920 s 22, reg 4
Land Ordinance 1931 (Cap 27) ss 2, 108
Land Settlement Ordinance 1933 rr 69, 71
Land Settlement Rules 1951 r 19
Malacca Lands Customary Rights Ordinance
Native Courts Ordinance 1955
Native Courts Ordinance 1992
Native Customary Laws Ordinance 1955 s 30A
Native Customary Laws Ordinance 1958
Native Customs (Declaration) Ordinance 1996
Pig and Deer Traps Ordinance 1924
Tuba Fishing Ordinance (Cap 39) 1947
Sarawak Inland Fisheries Rules 1995
Sarawak Land Code 1958 ss 5(7), 10, 15, 18, 29
Sabah Land Ordinance s 13
Timbers Order of 1899

Baru Bian (*Baru Bian*) for the plaintiffs.
Tan Thiam Teck (*Reddi & Co*) for the first and second defendants.
Susan Gau (State Legal Officer) for the third defendant.

Ian Chin J:

Introduction

This representative action was taken out on 26 January 1999 by Nor Ak Nyawai ('Nor'), Sekalai Ak Ling ('Sekalai'), Jerangku Ak Bakit ('Jerangku') and Lani Ak Taneh ('Lani') for themselves and on behalf of 'all other occupiers, holders and claimants of native customary land at Sungai Sekabai, Sungai Tajem, Sungai Ipuh, Sebauh, Bintulu Division … [of] Rumah Luang/Nor …' They will be referred to collectively as the plaintiffs.

The defendants are Borneo Pulp Plantation Sdn Bhd ('first defendant') who had been issued titles to two parcels of land, Borneo Pulp and Paper Sdn Bhd ('second defendant') the sublessee of the land and the Bintulu Superintendent of Lands & Surveys ('third defendant'), the authority that issued the titles to the lands.

The plaintiffs claimed that they have acquired native customary rights, described in the Iban language as *temuda, pulau* and *pemakai menoa*, over certain part of the lands ('the disputed area') and that the second defendant had trespassed and damaged the disputed area. Those Iban terms will be gone into in detail later. The second defendant had engaged contractors to clear the land and planted trees to feed a paper mill.

The issues in this case call for an examination of the rights of an Iban in relation to the land and its resources to which he has no documentary title. The answers must take into account Sarawak's history during the period:

1 when it was under the reign of the Sultan of Brunei just before 1841;

2 after it was ceded to James Brooke (the First Rajah of Sarawak) in 1841 right up to 1946;

3 when it was under the British as a Crown Colony from 1946; and

4 after Sarawak joined with other states to form Malaysia in 1963.

This journey through history is necessary because, and it is common ground — arising from the decision in *Mabo v State of Queensland* (1992) 66 ALJR 408 which was followed in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 and which decision was affirmed by the Court of Appeal in *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1998] 2 MLJ 158 — the common law respects the pre-existing rights under native law or custom though such rights may be taken away by clear and unambiguous words in a legislation. I am of the view that is true also of the position in Sarawak.

Mr Tan Thiam Teck, learned counsel for first and second defendants, and Ms Susan Gau, learned State Legal Officer, do not appear to me to dispute it because learned counsel had referred to a paper of Professor Douglas Sanders — *Indigenous And Tribal Peoples: The Right To Live On Their Own Land* (presented at the 12 Commonwealth Law Conference) — where certain passages read:

> A leading Australian constitutional law text summarizes the basic rule from *Mabo* decision as follows:
>
> > '… the indigenous population had a pre-existing system of law, which along with the rights subsisting thereunder, would remain in force under the new sovereign except where specifically modified or extinguished by legislative or executive action.'

The court in Canada held similar views in *Calder v Attorney General of British Columbia* 1973 SCR which is followed by *Adong bin Kuwau,* viz:

> …Hall J rejected as 'wholly wrong' the 'proposition that after conquest or discovery the native peoples have no rights at law except those subsequently

> granted or recognized by the conqueror or discoverer'. The preferable rule, supported by the authorities cited, is that mere change in sovereignty does not extinguish native title to land … but reference to the leading cases in each jurisdiction reveals that, whatever the juristic foundation assigned by those courts might be, native title is not extinguished unless there be a clear and plain intention to do so.

The disputes call for a consideration of whether the various legislation throughout those periods had the effect of extinguishing those rights since there is ample evidence, which I will refer to later, that such rights existed before the rule of the First Rajah. They also call for a consideration of whether those rights were ever exercised in the disputed area. But first, to the question who is an Iban because the defendants had contended that the plaintiffs are not Ibans.

Who is an Iban?

The answer that is sought is really to the question of who is a 'native' within the meaning of the term 'native customary rights' because unless you are a native you cannot claim native customary rights. Under the Sarawak Interpretation Ordinance (Cap 1), a native is defined to mean 'a citizen of Malaysia of any race which is now considered to be indigenous to Sarawak as set out in the Schedule; …'. The Schedule sets out the following races (and any admixture of them with one another): Bukitans, Bisayahs, Dusuns, Dayaks (Sea), Dayaks (Land), Kadayans, Kalabits, Kayans, Kenyahs (including Sabups and Sipengs), Kajangs (including Sekapans, Kejamans, Lahanans, Punans, Tanjongs and Kanowits), Lugats, Lisums, Malays, Melanos, Muruts, Penans, Sians, Tagals, Tabuns and Ukits. Though the term 'Iban' is not included in the definition it is conceded by the defendants through their learned counsel, Mr Tan Thiam Teck and Ms Susan Gau (for the third defendant), that the term also means Dayak (Sea) by virtue of the Adat Iban 1993 which is in my view a non-exhaustive codification of the native customary law for Ibans and by which an Iban is regarded as a Dayak (Sea) and therefore a native. But they contended that the plaintiffs had not proved that they are Ibans even though they have for days in court spoken the Iban language. Learned counsel had contended that: (1) none of them had adduced evidence to show that none of their ancestors had not married outside the Schedule races; and (2) none of the second plaintiff, third plaintiff and fourth plaintiff had asserted in their evidence that they are Ibans. Now, the burden is on the plaintiffs to prove that they are Ibans but Mr Tan had not said how the plaintiffs should go about doing it though it was suggested that they have to adduce evidence to show that their ancestors had not married outside the Schedule races. However, the defendants did not in their pleadings allege that the plaintiffs and those that they represent had done so and neither was it put to the witnesses that their ancestors had done so. It was also not put to the plaintiffs that they were not Ibans. I wanted further written arguments as there was no authorities cited and because if the contentions which I have referred to earlier are upheld, it would strip many Sarawakians who are the products of mixed marriages (between a native on the one hand and a non-

native) of their native status. The proof demanded by the defendants would practically be impossible to satisfy since the plaintiffs would have no idea whether their great grandparents had married outside the Schedule races. Learned counsel for the defendants subsequently abandon the contention that the plaintiffs are not Ibans. By then plaintiffs' counsel, Mr Baru Bian, had produced a 55 page submission on this issue which obliged me to say at least a little on the matter of proof. The burden shifts as soon as the plaintiffs are able to adduce sufficient evidence to support their contention that they are Ibans. I am of the view that the fact that they have asserted they are Ibans and that they all spoke Iban are sufficient prima facie evidence to establish the fact that the plaintiffs are Ibans; *a fortiori* when the assertion was not challenged. The burden then shifted to the defendants to establish their assertion that the plaintiffs or which of their ascendant is not of a Schedule race. The defendants did not put their case to the witnesses of the plaintiffs nor did they seek to allege it in their pleadings. Thus, there was nothing to rebut the *prima facie* evidence that the plaintiffs are Ibans and the plaintiffs have therefore discharged their burden of proof (see *Phipson on Evidence* (14th Ed), para 4–38). Therefore, applying the civil standard of proof, it is more probable than not that the plaintiffs are Ibans.

Whether representative action is suitable?

It was then contended by the defendants that the action cannot be a representative one as the plaintiffs are claiming damages and an injunction regarding the tort of trespass. Learned counsel referred to *The Supreme Court Practice* 1997, Vol 1, para 15/12/4 which was of the view that the court has no power to make an order for damages in a representative action. It also said that it is 'not clear how far injunctive relief may be granted to the plaintiff in his representative capacity'. But the plaintiffs' claim includes declarations which make the action a suitable representative action even assuming that the court cannot award damages since the court can still grant the declarations if the plaintiffs establish their case. Other reasons for contending that the present action cannot be a representative one depends on whether they have those native customary rights and if they have, a representative action is definitely the right course. I need only refer to *Jok Jau Evong & Ors v Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427 which I respectfully follow, as authority. If the plaintiffs succeed on the merits in their action, then this is a proper representative action. If they do not, it does not matter whether this is a proper action to be commenced representatively since the action is going to be dismissed anyway.

I will postpone further the narration of the legislative history until after the determination of what actually the plaintiffs claim as their rights (which are comprised in the Iban terms which I have mentioned earlier) and whether their ancestors have exercised those rights in the disputed area.

What is a 'temuda', 'pulau' and 'pemakai menoa'?

A *pemakai menoa* (also spelt *pemakai menua*), is an Iban term that refers to 'a territorial domain of a longhouse community where customary rights to land resource was created by pioneering ancestors' (Dr Dimbab Ngidang

on *Ethical Values of Sarawak Ethnic Groups*, p 33). Another description of it is in these words: 'The family groups (*bilek*) join together to make a longhouse which, with the surrounding contiguous territory, make up the *menoa*. It includes besides farms and gardens, the water that runs through it and the forest round about it to the extent of half a day's journey' (AJN Richards on *The Land Law and Adat*, p 24). Such a territory is chosen because of the presence of arable land, of rivers and forests from which life sustaining resources like water, fish, animals and forest products (including timber, wild vegetables, edible ferns, palm shoots, rattans, herbs or medicinal plants, fruit trees and bamboo) can be obtained. The evidence of the plaintiffs supports this and I need not go into them since that is not disputed. The pioneers of a longhouse community are usually relatives who banded together in search of a new territory and when this is found, the pioneers would build a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the families. The longhouse will just expand with new families. It is within this territory, called the *pemakai menoa*, that each longhouse community has access to land for farming, called the *temuda*, to rivers for fishing and to jungles, called the *galau* or *pulau galau*, for the gathering of forest produce. It has boundary separating it from that of another longhouse. The boundary is reckoned by reference to mountains, ridges and rivers or other permanent features on the earth. There are similar descriptions of these native customary rights by other authors, viz:

> Theoretically, all land whether jungle or cleared for paddy farming, is the property of the State, but the mere act of clearing a portion of virgin jungle confers on the labourer a restricted right of proprietorship over the land thus reclaimed and once this land has been farmed and so become *temuda* it is recognized as a reserved for the use of the original worker and his heirs and descendants. The rights of the State recognized in the fact that land reserved for farming cannot be sold by anyone, and that it is necessary to obtain permission of a Magistrate before any transfer of land can take place … .
>
> There are no restrictions on any one felling jungle provided he does not destroy valuable trees such as gutta, and vegetable tallow (*Engkabang* or *Ketio*), but it is a generally understood right that the owner of *temuda* has first claim to jungle land bordering on his clearing, and no one would fell such jungle without his permission.
>
> (Richards on *Dayak Adat Law in the Second Division*, p 107.)
>
> …
>
> The basic principle is as follows:
>
> Rights to land are established by the person who clears it of primary jungle, and from him they pass to all his descendants, male or female.
>
> The group of living descendants who thus share land cleared by their common ancestor is known as a *turun*. We shall call it a 'descent group'.
>
> There are, of course, as many descent groups as there are persons recognized to have cleared jungle land … .
>
> (Dr Geddes on *The Land Dayaks*, p 59.)

The more recent definition of a *pemakai menoa*, and which I accept to be equally accurate as those of the authors I have just referred to can be found

in a paper presented at a seminar (called *Seminar Pembangunan Tanah Pusaka Bumiputra* on 29 September to 3 October 1994) by Tan Sri Datuk Gerunsin Lembat. He was the former president of the *Majlis Adat Istiadat Sarawak* and in that paper he said:

> *Pemakai menoa* is an area of land held by a distinct longhouse or village community, and includes farms, gardens, fruit groves, cemetery, water and forest within a defined boundary (*garis menoa*).
>
> The purpose of creating a *pemakai menoa* involves the ritual ceremony of *punggul menoa*. After the ceremony has been performed, the first cutting of virgin jungle for settlement and farming can commence. From then onwards, the community can establish its rights to the felled area, boundaries (*garis menoa*) are drawn between villages. These boundaries normally follow streams, watersheds, ridges and permanent landmarks.
>
> *Pemakai menoa* includes cultivated land (*tanah umai*), old longhouse site (*tembawai*), cemetery (*pendam*) and forest area (*pulau*)

Another source regarded as authority by almost all the authors on Iban customs is the Secretariat Circular No 12/1939 ('the circular') and I would therefore accept that the circular states accurately some aspects of native customs, such as the following paragraphs:

(I) The right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle. This right must be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle is, in their eyes, not a matter for rule of thumb but for expert native opinion.

(II) Where not inconsistent with the above, the existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary right of user.

(III) Individual ownership is limited by the customary right of the community to a say in the matter of disposal to anyone outside the community.

(IV) No community or individual may hold up land in excess of requirements and, the extreme case, removal to another district automatically extinguishes all rights of the user. The old order (ie Fruit Trees Order 1899(12)) dated 10 August 1899 is an excellent exposition of this principle.

Since the rights of an Iban came about because he is a member of a community that occupies a longhouse it means an Iban at birth enjoys what his parents are enjoying. Therefore, the rights to a *pemakai menoa* that had not been lost can be passed down to the future generation of the longhouse community. Within a *pemakai menoa*, various parts of the land bear different descriptions. You have *tanah umai* which is land that had been cultivated with paddy or cash crops and this can be owned by the individual family of a longhouse that had cultivated the same and can be passed on to the family members. It can be lost to the whole community of the longhouse

if the family *pindah* (moved) from the longhouse and it can be lost totally where the whole community had *pindah*. Then there is *temuda* which is farm land and including land left deliberately fallow (see Lembat) for varying period of time to allow for the soil to regain its fertility and for the regeneration of forest produce. Some land are left fallow for upward of 25 years to allow for trees to grow (see Lembat). Thus, during the course of time, secondary jungle would appear and for that reason the description of *temuda* as secondary jungle in *TR Nasat Ak Chapi v TR Mandi Ak Genging* (CNCLS, p 97) is also correct. Since such *temuda* gives rise to a right of the natives to access it, so the description of *temuda* being 'customary land' was used in *Abang v Saripah* (CNCLS, p 163), see also *Abang v Saripah* [1970] 1 MLJ 164. The fallow phase of a *temuda* would give rise to 'young wild growth' and *temuda* was described as such by Richards in report to the Government of Sarawak, p 38). Therefore the varied descriptions of *temuda* are correct depending on which period in the life span of the *temuda* that is being referred to. *Tembawai* is a term for the old site of a longhouse (see Lembat). Finally we have *pulau* which is a term for primary forest preserved to ensure a steady supply of natural resources like rattan and timber and for water catchment, to enable hunting for animals to be carried out and to honour distinguished persons (see Lembat). Utong Anak Sigan, a witness called by the defendants, and who is a judge of the Chiefs Court and the *penghulu* of Sebauh sub-district testified to the custom of maintaining such a *pulau* and of its vital importance to the Iban community. These are his words:

> Yes, we preserve the jungle, a jungle so preserved is called a *pulau galau*. '*Galau*' means preserve. Purpose of preserving a virgin jungle is to enable the collection of timber for building boat, house, to collect ratan, to collect *dau biro* for building farm huts. To collect *damar* (resin) for sealing boat and for hunting wild animals. … Preservation of *pulau galau* is important for the survival of the Iban community.

Nicholas Bawin, the Deputy President of *The Majlis Istiadat Sarawak*, a witness called by the plaintiffs, also testified in similar vein. I have no reason not to accept their evidence; even less when these witnesses are obviously very knowledgeable about the customs of the Ibans. Given what I have said, it is untenable the submission of Mr Tan that a *temuda* must be land cultivated in accordance with the applicable written law because such *temuda* have existed before the coming into force of such law. I will deal with this point when I come to consider how native customary rights had been affected by various orders and legislation that had been passed. Mr Tan also argued that the plaintiffs cannot based their claim on the common law because it is not pleaded. But the pleadings had been replaced by the agreed statement of issues to be tried and the issue of native customary rights was whether such rights could exist over the disputed land, and this means, whatever the law maybe. Whether such native customary rights arise under the legislation or under common law is not an issue. In any event, the statement of claim when they refer to the legislation would also be referring to the common law right since the legislation advert to such common law right. Native customary right by its very term suggest a common law right

and when the term is used in the statement of claim it is clear that the existence of such a right under the common law was asserted. The native customary rights are similar to the rights under a native title of the Australian Aboriginals which had been held to be enforceable as common law rights (see *The Wik Peoples v Queensland* [1996–1997] 187 CLR 1, at p 84 per Brennan CJ).

In any event, evidence had been led without objection to show the existence of such rights from the time of the plaintiffs' ancestors. It is too late for the defendants in their submission to say that the plaintiffs cannot argue that they have such rights under the common law.

It was also contended by Mr Tan that all those works which I have referred to cannot be evidence since the authors have not been called. But we have the evidence of the said Utong Ak Sigan, Sapit and Nicholas Bawin Anak Anggat (apart from the plaintiffs) who gave evidence as to the nature of those native customary rights which evidence I accept and they are generally in accord with what the authors had written. Similar evidence was received by the court in *Hamit bin Matussin & Ors v Superintendent of Lands & Surveys & Anor* [1991] 2 CLJ 1524. Therefore, even without the works of those authors there is ample evidence from witnesses who had testified in this case. The works, though unnecessary since I accept the oral evidence, serve to confirm the existence of such customs. The existence of such native customary rights were also affirmed by the various orders and legislation which I will refer to later when I come to consider how such native customary rights had been affected by them. This takes me to the next question of whether such native customary rights had been exercised by the plaintiffs and their forefathers and whether they were exercised in the disputed area.

Whether those rights were exercised by the plaintiffs' and their ancestors in the disputed area?

This question calls for a determination of the extent of the plaintiffs' *pemakai menoa*. That means finding its boundary which is defined by land features. This is the result of the failure of the authority to survey and record such boundary though it was the intention of the authority then when it passed the Land Settlement Ordinance in 1933 which matter will be mentioned in more detail later. Since, from what I can gather from the witnesses and authors, live revolves around the longhouse, the situation of a *tembawai* and of the longhouse will give an idea as to the possible extent of their *pemakai menoa*. The history of the plaintiffs' longhouse, known as longhouse Nor and also longhouse Luang, was narrated by Sapit and since it was not disputed I will accept it as correct. Sapit, now 51 years old, is the present *tuai rumah* (head of the longhouse) of longhouse Sapit which broke away from the community of longhouse Nor. He was formerly the *tuai rumah* of longhouse Nor from 1980 until 1987 after having lived there since 1960. According to Nor, one Terang took over from Sapit before he (Nor) took over from Terang. The present site of longhouse Nor was used since 1955 when Luang Anak Saga (Luang) was the *tuai rumah*. All of them are

descendents of Besi Anak Empin ('Besi') who had migrated from Kanowit to settle down in Sekabai, Bintulu, before 1955. But how long was it before 1955? There is no evidence to support a definite answer. However, there is undisputed evidence of the existence of five *tembawai*, the Iban term for the sites of previous longhouses before the present location was chosen. Though the reasons for moving are not known, it can be assumed that the then community did not relocate themselves pointlessly, that is, to move again no sooner after they have built their longhouse. The present longhouse has been in existence since about 1955 which is about 46 years ago and still has not moved. This is evidence that the community does not simply move on in a relatively short period of establishing a longhouse at a place. Given the fact that crops and trees take time to grow, it is inconceivable that the cultivated land which are within the vicinity of the longhouse would be abandoned without at least the first harvest and such harvest may have to wait years depending on the crops or fruit trees. So, we can leave out the community moving on after only a year at a particular place. It is more likely than not that they will settle down, say, for at least five years before moving on to allow the land to fallow. It will be recalled a writer even suggested a fallow of upward of ten years (*Ngidang*). It is plausible that one of the reasons of the shifting of the location of the longhouse is for it to be nearer to new area for cultivation. Besi built the first longhouse at Lubuk Lelayang which is located downstream of the Sekabai River and that was, according to Sapit, during Brooke's time. He thereafter moved upstream from site to site until the place called Sabut where he died and his son-in-law Saga Anak Umbar ('Saga') took over as the *tuai rumah*. As time progresses, the numbers of doors increased in the longhouse and when Saga moved to the site called Angat, the longhouse has about 90 doors. It was after Saga had died that Luang took over and Luang built the existing longhouse which is about half a kilometre from the Angat site. By Luang's time the number of doors had shrunk to 75 because some members have left. All these sites were near to Sekabai River. Therefore, allowing for five years for each longhouse before it moves on, would mean that the previous sites have taken a total span of at least 25 years before it settled down at the present site in 1955. This means, the ancestors of the plaintiffs were at Sekabai by the latest in 1930. But that does not mean that their customs develop overnight in 1930. The customs relating to *temuda*, *pulau* and *pemakai menoa*, is a way of life of the Iban that is intimately connected with the land and which was in existence even before the arrival of the First Rajah. Therefore it goes much further back than the year 1930. This is how AF Porter in his paper called *The Development of Land Administration in Sarawak from the Rule of Rajah Brooke to the Present Time* (1841–1965), p 18, stated it:

> At the time of James Brooke's arrival in Sarawak there had been for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian adat'. Within Sarawak the term 'adat', without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually 'native customary law' or 'native customary rights'.

Thus, when the First Rajah arrived, the Ibans had already a body of customs which is referred to as native customary rights and this includes the rights I have discussed. Those rights being customs, I can conclude that the plaintiffs' ancestors must have practised the same customs as the present day Ibans practise. The defendants did not point to any writing of any historian that hold a contrary view. Therefore, I conclude that the plaintiffs and their ancestors had exercised those native customary rights known as *temuda*, *pulau* and *pemakai menoa*. I can also conclude that where you find a longhouse in a remote area, that is in an area with jungles and rivers, you can assume that activities connected with *temuda* and *pulau* and *pemakai menoa* have been carried out since it is the livelihood of the folks staying in the longhouse. They are dependent on them for survival. The longhouse is located in the district of Sekabai, Bintulu, Sarawak. It is built near a main river called Sekabai. The following map shows the area involved.

The disputed area falls into the class of land called Interior Area Land under the Land (Classification) Ordinance 1948 (which legislation will be discussed later).

The Sekabai River has a number of tributaries and I need only refer to the relevant ones. The one farthest from longhouse Nor is the Ipuh River and then, moving nearer, the rivers Tajem, Semerah, Pantu, Anyie and Naing. Sapit described the various activities like clearing of jungle, farming of land, fishing in rivers, hunting in jungle and gathering of forest produce from the jungle being carried out in the areas. He gave evidence that the rivers Tajem and Anyie are two tributaries of the Sekabai River that fall within the *pemakai menoa* but he said there is no *temuda* at the upper reaches of the rivers Tajem and Anyie. Those upper reaches are in the disputed area. He agreed that his ancestors fished on those rivers and hunted for animals and collected forest produce from the jungles there. No attempt was made to discredit the testimony of Sapit who, it will be recalled, was called by the first and second defendants. However, the statements of witnesses about those ancestors, who had died before the witnesses were born, as having exercised those rights, obviously cannot be taken as proof of the fact that they had in fact been exercised. But it can be accepted as regards those ancestors whom they were able to personally witness. Furthermore, the proximity of the present longhouse and of all the said *tembawai* to the disputed area definitely lend support to those tributaries, namely the rivers Tajem, Semerah, Pantu, Anyie, and the surrounding jungles having been accessed before for farming, for fishing, for hunting and for gathering of forest produce. There is also evidence that the plaintiffs and, at least their more immediate ancestors, have planted fruit trees along the northern end of the disputed area. The growing fruit trees are living testimony of that. All these support the plaintiffs' assertion that they have farmed, fished and hunted in the disputed area. If they have, I see no reason why their ancestors

could not have. After all, there is no Sunday market in the jungle like the Kuching Satok Sunday Market where you can simply drop by to buy your meat, fish, vegetable and building materials. Even if there is, they would need to have money which would be wanting if they live in the jungles. They do not need it because they live off the jungles. Therefore, the plaintiffs and their ancestors must have turned to these rivers and forests for the supply of those necessities. The defendants' witness Nogeh Anak Gumbek had visited the disputed area and he confirmed the presence of pockets of cleared lands with trees there of about six to eight years old and some growing to 20 feet high. He said that the folks of longhouse Nor had protested and prevented the clearing of these sites. He claimed that the folks did not object to the clearing of the other part of the disputed area but this cannot be true as he himself said that the folks later stopped the second defendant's contractor from felling the timber. At the very least, the evidence showed that the plaintiffs or their ancestors have accessed those pockets of land in the disputed area for hunting and fishing and the collection of forest produce if not for farming also. Since they were so near to the rivers and to the surrounding forests in the disputed area, it is inconceivable that the past and present folks of longhouse Nor did not fish in those rivers or that they did not forage in the jungles for produce or hunt there for food. As for the claim that the trees were only 8 years old, thus bringing the tree-planting to a date after 1958, he says he can tell the age of a tree by looking at it. As to how he is able to do so, this is what he said:

> Knew from my own experience. When I was a kid I used to help my parents in the farm and I have also worked for Salcra where we have planted thousand of hectare with oil palm; so I have seen *temudas* of two year to eight years old.

This witness is employed by the second defendant as a natives customary rights manager in 1997 for the purpose of ensuring that his employer can use as much of the leased land as possible. That means as much as possible of the land should be free of native customary rights. So I must examine what he said closely. It will be noticed that he did not state the type of trees that he had examined when he said they were of about 6 to 8 years old. Different trees will have different girth and they stop growing (be it in girth or height) after certain years. That is common knowledge. I need only take the example of most tropical fruit trees which after certain years will stop growing in its height and girth. Therefore, a mango tree or a rambutan tree, whether grafted or not, of 15 years of age will look the same today as it was, say, 8 years ago. This means that those trees may look 8 years old though it is actually 18 years old. The same goes for other trees. Therefore, on this point alone, his evidence about the age of the trees cannot be accepted. It is common knowledge that the age of a tree can be determined by counting its grain, that is the number of circles in the grain of the trunk of a tree, with each circle denoting one year of growth. That is a more reliable method at ascertaining the age.

It was also contended that since he was not told by the longhouse folks about trees in certain places of the disputed area having been cleared before 1958, it was improbable that those trees had been cleared. But that evidence when tested against the proximity of the disputed area to the longhouse, that is it being within reasonable reach, and of the defendant's own said witness who said the folks fish and hunt there, it is more probable that the felling of trees had happened even though he may not have been told. Then again, why should he be told about trees being planted long ago when the subject was not raised and the occasion did not call for the matter to be mentioned.

Mr Tan had argued that the plaintiffs had contradicted each other when one said he can still fish there while another said there is no longer any fish there. I am of the view that the witness Lani exaggerated the absence of fish in order to condemn the defendants for having polluted the river. It is not possible for muddy water to kill a fish as the absence of any evidence of floating dead fish dispel such possibility. This blemish in his evidence cannot justify the conclusion that the plaintiffs and their ancestors had never fished there. The defendants' own witness Sapit had said the folks of longhouse Nor had fished in the Rivers Tajem and Anyie. It is therefore untenable for the defendants to argue that the plaintiffs or their ancestors did not fish in those rivers. It was then argued that since the disputed area was logged over there could not be any animals left for hunting and that therefore the plaintiffs could not have hunted there. But logging does not mean the complete destruction of all plants and trees since the law only allows trees of certain minimum girth size to be felled and which the timber licences produced in this case also state as a term of the licence. If there was no timber left the loggers would not have gone back again to relog the area. That they did is testimony of the fact that there are trees left in the area and this has to be the case as the law does not allow complete destruction of trees and plants when logging is done. Therefore, there will still be vegetation and trees which the animals can feed on and hide themselves in though they may be fewer in number.

This logging of the disputed area was carried out between 1984 and 1987 pursuant to a licence issued by the Forest Department to a company. The plaintiffs had allowed the logging to proceed without any hindrance and this, it was argued, has resulted in the plaintiffs losing their native customary rights over the disputed area. The court was referred to the case of *Udin bin Lampon v Tuai Rumah Utom,* Cases on Native Customary Law in Sarawak ('CNCLS') at pp 15–16. In that case a District Native Court had held that certain land was communal farming land occupied by *tuai rumah* Utom. Udin, who claimed a right of individual occupation by customary tenure appealed against the decision to the Supreme Court. That case turns on the said Order 1899 which, it will be recalled, decreed that any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district and may not prevent others from farming the land. The land concerned was formerly occupied by one Juing who have moved to another place which thus extinguished his right to

the land and Udin's claim was based upon the rights of Juing. Udin's claim therefore failed. The Supreme Court there also held that the order was declaratory of the customary law and then went on to say:]

> Even if the appellant could establish any rights, which is not the case, it is difficult to see how he could rely on them after permitting the land to be used by non-natives (namely Chinese).

It was upon that passage that it was argued that the plaintiffs by permitting the company to log in the disputed area had lost their native customary rights. The first logging was done from 1984–1987 during which time Sapit was the *tuai rumah* and RM300 was paid to each door. The disputed area was logged again in 1989 but this time money was expended by the company to carry out certain ritual ceremonies. Does that act of letting someone fell the timber destroyed completely the native customary rights over the disputed area? All that can be said of such act is that the plaintiffs had sold the timber which the law does not allow (see below O XIV of 1921, r 11; the Forests Ordinance (Cap 31) 1934, s 55(1); the Forests Ordinance, 1953, s 65(1)). But the law, as will be discussed later, does not render such native customary rights as having been extinguished. Therefore, it cannot be the law that if a native sells the timber from a forest over which he together with other longhouse folks has a right to fell for his own use the longhouse folks would lose their native customary rights in that forest. Furthermore, we must not forget that the natives, who are entitled to native customary rights, consist of not only adults but children as well, and it is inconceivable that such children can be deprived of their rights just because the adults decide to sell some or all of the timber from a forest. If such results were intended, there must be a legislation to that effect and there is none. There is also no evidence of any custom that supports the proposition that if the folks had sold the timber their native customary rights in respect of the forest would be lost. The comment made in the case under consideration was not made with reference to any consideration of the customs nor to any orders or legislation. I am respectfully of the view that the comment is not true of the actual position. If timber is sold, they can only be subject to the fines imposed under the law as will be seen later when I consider those provisions. It must be remembered that the logging was not done without objection and the objection took the form of getting payment from the company. Furthermore, the forests in the disputed areas are regarded as communal forests in the sense that the folks of longhouse Nor rather that an individual are entitled to exercise native customary rights in them. Those facts distinguished this case from the case of *Nyalong Anak Bungan v The Superintendent of Lands & Surveys, Second Division, Simanggang,* CNCLS at pp 139–185, see also *Nyalong v The Superintendent of Lands & Surveys Second Division, Simanggang* [1967] 2 MLJ 249 which dealt with a claim by an individual to a parcel of land. This case is significant for the plaintiffs in that it recognized the native customary right of *temuda*.

The upper reaches of those rivers and the surrounding area fall, as mentioned earlier, within the disputed area. The disputed area measured approximately 672.08 hectares. However, the first defendant and second

defendant had maintained, by putting the case to the plaintiffs' witness, that the plaintiffs' ancestors did not clear any land for cultivation in the disputed area and that it included only land cleared by the plaintiffs in 1980. The disputed area, except for a pocket, had already been planted with trees by the second defendant when Samy Ak Ising ('Samy'), an unqualified surveyor, did a ground survey in early 1999 with the aid of global positioning system instrument. It was done upon the instruction of the plaintiffs. He testified that along the boundary of that part of the land claimed by the first defendant and which is also claimed by the plaintiffs for the exercise of the native customary rights, he found old and tall fruit trees. Sekalai testified that there were three *pulau galau*, which is a variation in the description of *pulau*, in the disputed area. He put his signature to a letter dated 11 August 1998 addressed to the second defendant to complain of the invasion by the second defendant of their land. It was around this time that the second defendant wrote to Nor to complain of his trespass against the land of the second defendant. Nor testified that the longhouse folks no longer plant padi, hunt for wild boars, fish and collect rattan that were found in the disputed area because the defendants in 1998 had planted trees there. He said it takes one hour to walk from his longhouse to the nearest part of the disputed area and he disagreed that it took three hours because the distance was at least six kilometres. Pausing here, I do not think that it takes three hours to do a purposeful walk of six kilometres, very leisurely maybe. Be that as it may, I am of the view that it does not matter since it is still within reach of the folks of longhouse Nor to exercise their rights.

Of course, there must be a limit as to the extent of a *pemakai menoa*. One obvious limitation there must be the physical ability of the folks of a longhouse to traverse considerable distance carrying the forest produce or the kills back to the longhouse. It will be recalled that Richards on *The Land Law and Adat*, p 24 said, *supra*, that a *menoa* also means *pemakai menoa* — '… It includes besides farms and gardens, the water that runs through it and the forest round about it to the extent of half a day's journey'. I think that limit makes sense simply because any longer period would mean groping in the dark in the jungle which is something not any civilisation wants. Furthermore, any distance longer than that covered in half a day would not be practical for the hauling of forest material on account of the physical exhaustion that will be involved and the meat of carcass would become unfit for consumption after too many hours remaining uncooked. Giving that the area in dispute is, according to the defendants' case, three hours' journey from longhouse Nor/Luang, it is still within the useful reach of the folks. The time taken could even be shorter if a boat is used and that is possible when the water level of those rivers allow it. Therefore, the distance of the disputed area, even at the furthest point, from the longhouse does not rule out the possibility of the plaintiffs and their ancestors having gone there to exercise their native customary rights, if not also to clear land for cultivation, at least to fish, to collect forest produce and to hunt for animals.

In my view, I am satisfied that the native customary rights which I have referred to earlier were exercised by the plaintiffs and their ancestors in the disputed area. Mr Tan had contended that the plaintiffs had not produced

any direct evidence that their ancestors had exercised those rights. How is it possible to produce a witness who can testify to what he did or saw some 200 years ago, which is necessarily the case if Mr Tan's contention is to be upheld, was not gone into. If the present generation can prove that they are practising which historians described as having been practised 200 years ago, then that is sufficient proof that such native customary rights had been practised 200 years ago. The authority for this proposition can be found in *Halsbury's Laws* Vol 12 (4th Ed) para 422, which says:

> … as a general rule proof of the existence of the custom as far back as living witnesses can remember is treated, in the absence of any sufficient rebutting evidence, as proving the existence of the custom from time immemorial.

I have also referred to the several authors and historian who had given their opinions and who were unanimous in their views as to the existence of those native customary rights which I have described. Their opinions are relevant under ss 48 and 49 of the Evidence Act 1950 and I accepted them as tending to establish on a balance of probabilities that they existed before the arrival of Brooke. I accept that they were in existence even before the arrival of James Brooke and this was stated by Porter in his paper called *The Development of Land Administration in Sarawak from the Rule of Rajah Brooke to the Present Time* (1841–1965), p 18, in these words:

> At the time of James Brooke's arrival in Sarawak there had been for centuries been in existence in Borneo and throughout the eastern archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian adat'. Within Sarawak the term 'adat', without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually 'native customary law' or 'native customary rights.

And they have been practised since then and up till now. Given the customs of the Iban to band together to live in a longhouse, the very presence of a longhouse in a jungle should, as I have said earlier, justify the conclusion that the various activities had been carried out by the occupants. Materials are required for the construction and repair of a longhouse and the existence of such a longhouse at a place would definitely mean forays having been made by the occupants into the jungles to gather the material. Since food is necessary for survival, it must necessarily be the case that hunting for animals in the jungles and fishing for fish had been carried out. Farming would also have to be carried out to augment their food supply. Therefore, once it is established that there is a longhouse in a particular area, it can be assumed that all those activities which I have mentioned earlier had been carried out. There is no dispute that the various *tembawai* exist and the present longhouse Nor/Luang is still being occupied giving rise to the conclusion that the various activities had been carried out before. This has the effect of shifting to the defendants the burden of establishing that they were not done and the defendants had failed to do so. The defendants argued that those clearings could not have been done earlier than 1951 because aerial photographs taken in 1951 do not show such clearings. That conclusion was urged following the evidence of Lim Siau Chung, a

photogrammetric officer in the employ of the Sarawak Lands & Surveys. He said that the 1951 photograph does not show any clearing or secondary forest in the disputed area while the 1963 photographs show only one 2-acre site where the land was cleared while the rest of the disputed area was covered by primary forest. This means the other pockets of cleared land could have only been cleared after 1963. His evidence was criticized by Mr Baru Bian, learned counsel for the plaintiffs, who referred to the evidence of William Lawing who said that the disputed area was logged over in 1989 and therefore there could not be any virgin jungle as maintained by Lim Siau Chung but learned counsel failed to appreciate that Lim Siau Chung was testifying to the condition of the disputed area as in 1963. Of course, this does not mean that the jungles in 1951 could not have been cleared years ago and planted with trees that grew to become the jungle as shown in the 1951 photographs. Though there is no direct evidence of that probability, there is evidence that the disputed area was accessed by the previous and present folks of longhouse Nor and their ancestors. James Brooke himself had as far back as in 1840 wrote:

> The fruit trees about the Kampong, and as far as the jungle round, are private property, and all other trees which are in any way useful, such as the bamboo, various kinds for making bark-cloth, the bitter kony … and many others. Land, likewise, is individual property, and descends from father to son; so, likewise, is the fishing of particular rivers, and indeed most other things … . (See *James Brooke's Journal*, Vol 1, p 210 — Borneo and Celebes, as reproduced by Anthony Porter, p 19).

So, the right to the jungle around the longhouse is recognized by the First Rajah and it can be inferred that any folks of any longhouse would exercise native customary rights to any jungle which is within a half-day journey by foot from a longhouse. That can be presumed unless the contrary can be proved. I agree with Mr Baru that the probability exists that the jungle that was shown in the 1951 photograph could be the result of the land being firstly cleared and then left to fallow by the ancestors of the present folks of the longhouse Nor. Therefore, it was possible that cultivation had taken place before. The contrary can be easily established by looking at the age of the trees in the area but they have all been felled thus the destruction of a most valuable piece of evidence. My suggestion is that in future claim to native customary rights should be resolved by an inquiry first before the evidence are destroyed by the destruction of the trees and the bull-dozing of the land through licensing or alienation. This means giving notice calling for claims before any land is alienated.

Mr Tan had gone to great length to attack the various aspects of the evidence of the witnesses of the plaintiffs. The first is in regard to the ceremony of *panggul menoa* which I referred to earlier when I reproduced passages from the works of Lembat. Nor had given testimony that he heard from his grandparents that the ceremony was carried out at a time when he was not born yet. Mr Tan had contended that that is hearsay and inadmissible whether it was objected to or not (citing *Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209; *Tuong Aik (Sarawak) Sdn Bhd v Arab-Malaysian Eagle Assurance Bhd* [1996] 2 CLJ 134; *Aw Kew Lim & Ors v PP*

[1987] 2 MLJ 601; *Goh Beng Seng v Dol bin Dolah* [1970] 2 MLJ 95; *Packiam & Anor v PP* [1972] 1 MLJ 247). It follows from that contention that if the ceremony was performed a century ago, living witnesses had to be produced and that would be quite impossible and even if you do find one, recollection of what happened so long ago would also be impossible. As against that we have evidence of the plaintiffs that they have been going to the forests to collect jungle produce, to land cleared of trees to farm and to rivers for their water and fish. There is also evidence of the various *tembawai* existing over many decades. All these activities had been carried on for decades without any attempt on the part of the authority or other claimant of native customary rights to dispute their right to do so. Thus, in my view, in all probability whatever ceremonies that needed to be carried out, including *panggul menoa*, must have been carried out. If such is not the case, the exercise of the native customary rights by the plaintiffs and their ancestors, would have been challenged at least by the neighbouring longhouses. But, there is no evidence of that. Given the circumstances, I can presume that it was carried out and this shifts the burden on the defendants to prove that the plaintiffs and their ancestors had not performed the ceremony. The defendants had failed to do so. Therefore, nothing turns on the hearsay evidence.

Mr Tan then directed his assault on the evidence concerning the boundary of the *pemakai menoa* for the purpose of showing that the disputed area could well be outside the boundary. What the plaintiffs had done were to organize themselves into two parties with each party taking turn to accompany the unqualified surveyor Samy on foot and traversing the disputed area and the whole of the area claimed as their *pemakai menoa* for the purpose of producing a map of it. The map was produced from the input of the members of these two parties. They claim the boundary by reference to various mountains, hills, ridges and trees as Lembat said:

> These boundaries normally follow streams, watersheds, ridges and permanent landmarks.

In this regard, there are discrepancies in the description of these landmarks by the witnesses of the plaintiffs which led Mr Tan to contend that the evidence is vague, unsatisfactory and unreliable, citing *Ara bte Aman & Ors v Superintendent of Lands & Mines, 2nd Division* [1975] 1 208. That case is of no assistance because the facts there are entirely different. It does not have, as we have in this case, parties of people doing a ground survey by reference to various landmarks with the help of an unqualified surveyor. Nor had referred to five landmarks which he took Samy to but three of them were not shown on the map produced by Samy. This, it was contended cast doubt on the accuracy of the map. Samy was cross-examined by both counsel for the defendants for almost three days and he was never asked why he did not mention those landmarks on the map he produced while doing so with the others. In the end we do not have his reason and it will only be pure summation and unacceptable that the failure to mention such details should mean that Samy's map is totally inaccurate and unacceptable. If

umbrage is to be taken of these omissions, Samy should have been asked and when you do not do so you cannot now take issue. A witness cannot be condemned as being unreliable as otherwise you would have the absurd situation of condemning someone for not giving answers to questions that he was not asked. If the defendants were of the view that the omission was significant, questions should have been asked. That they did not, means that it was of no significance and I so conclude. The map he produced is as accurate as it can possibly be given the equipment he has. But it is far better than the photographs produced by the defendants because the ground survey was done and various landmarks were correctly identified as to properly fix the situation of the disputed area and this includes the areas which the second defendant already planted with trees. This was further helped by the fact that fruit trees planted by the plaintiffs and their ancestors were found next to the trees planted by the second defendant. The areas where the second defendant had planted trees are not in dispute and this had been denoted in a map. The fruit trees were found just by the edge of these planted trees. This area was traversed by Samy and one of the parties of folks. Therefore, even if the instrument used by Samy may not have been properly calibrated, as the defendants contend, the ground features in the form of the said trees and the various mountains, ridges and rivers certainly help to identify and locate the areas which the plaintiffs had described and to which the plaintiffs and their ancestors had accessed for fishing, hunting and the collection of forest produce. It therefore cannot be true that the area described by the plaintiffs over which they have exercised their rights relating to *temuda* and *pulau* could be thousand of metres out because the boundary of the map produced by Samy was fixed by reference to the land features I have mentioned. It covers the area where the second defendant had planted trees and the map was drawn by Samy with the aid of, among others, these features. I therefore find that the disputed area is within the boundary of the *pemakai menoa* of the plaintiffs. I do not propose to go into the extent of the other sides of the boundary since they do not fall within the present dispute and since the folks of the other longhouses are not parties to this action.

The evidence of Nor with regard to the boundary of the *pemakai menoa* was criticized because the witness had said the Anyie River flows from longhouse Nor to longhouse Nading while the map produced by Samy does not support that. But that does not concern the disputed area and though he may tend to exaggerate to position himself and the other plaintiffs with an eye to pre-empt possible rival claim by longhouse Nading, I cannot hold that against him as to justify a condemnation that his evidence is totally unacceptable. But I do bear in mind that he has more than one reason to claim as much land as possible. The proximity of these rivers and of the surrounding jungles to longhouse Nor and the *tembawai* render it probable and support the assertion that the plaintiffs and their ancestors had accessed these rivers and forests.

Mr Tan had gone to great length to criticize the other evidence adduce on behalf of the plaintiffs some of which I have already mentioned and some I will not mention specifically but have considered them, and I am of the view that all of them do not affect the accuracy of the ground survey done by Samy with the help of the plaintiffs and the folks of the longhouse and the map that Samy produced and from which the disputed area was established. Mr Tan wants perfection and he wants the evidence to synchronize but I am only looking for evidence that can stand evaluation on a balance of probabilities. I find on a balance of probabilities that the disputed area (as shown in the map P172) was the area where the plaintiffs and their ancestors had cleared for cultivation, accessed for fishing, hunting and to gather forest produce, all rights associated with *temuda* and *galau* and they fall within the *pemakai menoa* of the plaintiffs. This takes me to the next question of whether those native customary rights had been affected by any orders or legislation. It will be seen that some of them in fact indirectly recognize these native customary rights.

Whether those rights were affected by any order or legislation?

Since the words of Rajah Brooke after he was ceded the territory was the law, it being that he ruled by issuing orders, it is significant that when he issued the Land Order 1863 he made provision to alienate only 'unoccupied and waste lands, the property of Government'. That term envisaged land having already been occupied will not be alienated. This is clear when Brooke further declared that the Chinese could settle but could not govern or interfere with the Malays or Dayaks or take the land which they had already occupied. Richards, at p 18, was of the view that such order do not cover natives living outside Kuching and he gave reasons for that conclusion and which I agree, viz:

> This order was amended and added to in 1871 and 1882, applying some of the provisions to the new areas acquired by the Rajah and altering the arrangements for persons living in the township of Kuching. Most of the orders before 1920 do not, in fact, refer to land outside the township of Kuching which had a radius of one mile from the Court House, until 1899 when it was extended to seven miles from the Court House. When squatters were mentioned they did not include the people now known as squatters in the country land. They were Javanese, Chinese and persons from outside the jurisdiction of the Rajah who had flocked in to increase the population of the growing town of Kuching. In 1889 they were classsed with cattlemen, eating houses and small shops. The areas with which the Government was then concerned were what is now known as Java Street, Kampung Java and the area near the Mosque. There was still, until the turn of the century, little or no interference with the customs and uses of land in the country side.

Then the 1875 order was made which is another example of the admission of the existence of native customary rights. The relevant part of that order says:

> Whereas it is a common practice among the native community to make large clearings of old jungle and afterwards abandon them, I hereby direct that should any clearance of the kind be made in future, and the persons who cleared the ground allow the same to go uncared for, they will lose all claim or title to such lands; and should any one be desirous of making gardens thereon, they will be permitted to become squatters; and notice is hereby given that should the original clearers try by any means to molest any such squatter they will render themselves liable to be fined at the rate of $10 (ten dollars) per hundred fathoms square for all the land they may have cleared, they having destroyed useful jungle produce, such as firewood, rattans & etc, for no purpose.

That is a declaration in no uncertain term of the right of a native to clear virgin jungle. Such order is declaratory of the Dayak native law (see *Udin Anak Lampon v Tuai Rumah Utom* [1949] SCR 3; MB Hooker in *Native Law in Sabah and Sarawak*). That order did not in any way abolish the right to clear virgin jungle. Then came the Timbers Order of 1899 which requires a person who wants 'to work and collect timber for whatever purpose' to first obtain a permit from the resident's office failing which a fine of $25 is to be paid. It was urged that this has the effect of abolishing the native customary right of entering into jungle to fell timber. But it has a provision to say that the order is to apply to the first Divisional Residency whereas the disputed land is located in the fourth Division of Sarawak. Therefore, this order does not apply. Even if it applies, that order only imposed a fine and did not provide for the confiscation of timber nor for the default to be an offence. If it is intended to abolish the native customary rights to enter into the jungle to fell and collect timber, then there must be explicit words to that effect and there is none. The next order that calls for consideration is the 1899 Order which is worded this way:

FRUIT TREES

> I HEREBY direct that the following rules shall be observed with respect to Dayaks removing from one river or district to another:
>
> Such fruit trees which have chiefly sprung up from seeds thrown out of and about houses, and have become common property of the inhabitants of a long house or village, are in no cases to be sold or in any way transferred or claimed by individuals leaving such houses or villages.
>
> Any Dayak removing from a river or district may not claim, sell, or transfer any farming ground in such river or district, nor may he prevent others farming thereon, unless he holds such land under a grant.
>
> Such products as sago, coffee, chocolate, cocoa-nuts, pinangs, etc, the cultivation of which necessitates labour and expenditure, may be sold by the owners thereof in the event of their removing, on proof of ownership to the satisfaction of the head chief, or with the sanction of the District Officer.
>
> No jungle trees such as bee-hive trees, gutta or india-rubber trees, wild sago, oil nut producing trees, or fruit trees, may be sold by any persons removing unless they can clearly prove that such trees were planted and cultivated by

> them; nor may any rattan lands be claimed or sold, unless such lands were planted by those claiming or selling them.
>
> All live stock such as pigs, poultry, dogs, etc, and bee-hives owned by persons removing may be sold by them without hindrance.
>
> Order by HH the RAJAH
>
> 10 August 1899.

The order refers to a longhouse, farming ground, fruit trees and jungle trees which is declaratory of the native customary rights to them. It did not abolish any of them but only provide, among other things, that any Dayak who leaves for another district cannot claim any right to the fruit trees and farm land. It is the same with the *Engkabang* Trees O I and II of 1912 where though it prohibits the felling of *engkabang* and *ketio* trees, it only imposes a maximum fine of $50 and nothing else. The most that can be said about this order I is that it prohibits only two types of trees and not the rest. This again is another example of the law indirectly admitting that there was a native customary right to fell timber from the jungle. This order I was supplemented by O II which says:

> WHENEVER any person or persons are desirous of planting plots of marsh land which have been cleared within three years previously or hill which has been cleared within seven years previously, such person or persons will be permitted to destroy all kinds of *engkabang*, *ketio*, and *jelutong* trees found on such lands when necessary without penalty, but when a person or persons desire to clear marsh land covered with jungle of a growth of more than three years old or hill covered with a growth of more than seven years old where such trees are growing, permission must be first obtained of the officer in charge of the district; otherwise the penalty will be enforced.

If any person or persons, having destroyed the above named trees of whatever age when clearing with the intention of planting any kind of marketable produce, afterwards forego such intention or neglect such plantation after it has been planted, such person or persons shall be liable to prosecution and fine under this order.

Again, this order has the effect of recognising the native customary rights of clearing jungle for cultivation. It provides for a penalty to be paid if the clearing involved the felling of three types of trees where prior permission was not obtained. It will be noticed that it does not provide for the eviction of the occupants of land that has been so cleared and cultivated.

Declarations of the native customary rights of fishing can also be seen from the 1882 Order, dated 16 May 1882, which simply says:

> All licenses for fishing, hitherto necessary, are this day abolished.

Now and as it was then, the easiest way to catch fish and to catch plentiful was by way of tuba but it is a wasteful way of fishing since many fish may be killed and remained uncollected. It was with this in mind that the Tuba Fishing Order was issued on 28 June 1900. Again, it serves to confirm the right of a Dayak, which term includes an Iban, to fish even with tuba after the passing of that order as can be gathered from the provisions there, viz.:

TUBA FISHING

Whereas it is expedient to place restriction on the use of tuba for fishing. I hereby enact as follows:

The use of tuba is prohibited in all running streams or navigable river by all persons without the special sanction of the resident or officer in charge of the district, who, however, shall not grant such sanction to any, excepting Dayaks, to fish with tuba excepting when it is proposed to throw the tuba within five miles of the sea-shore, and permission to Dayaks to fish with tuba shall only be granted occasionally.

Any person using tuba without permission to do so will be liable to a fine not exceeding twenty five dollars.

This order shall be enforced in the Sarawak and Samarahan Rivers and their tributaries and streams, and shall be enforced in other rivers only as I may direct from time to time.

28 June 1900.

This is also true of the Tuba Fishing Ordinance (Cap 39) which came into force in 1947. The next relevant legislation is the Fisheries Act 1985 which provisions relating to turtle and riverine fishing were adopted to apply to Sarawak pursuant to the Fisheries (Adoption) Ordinance 1994. The Sarawak Inland Fisheries Rules 1995 were referred to by Mr Tan but I cannot find any provision therein as forbidding an Iban from fishing in any river in exercise of their native customary rights save for a prohibition against the fishing of certain species. The Rules only forbid the use of certain equipment and devices.

Hunting had also been acknowledged as a right of the Ibans of Sarawak when it was sought in 1884 to prevent the Dayaks from using traps in the jungles to snare pigs and deer. That order called the Pig Traps Order says:

> It is hereby directed that the setting of Dayak pig or deer traps in the jungle is illegal, and any person setting such traps will render himself liable to a fine of twenty dollars. Orang Kayas are to be responsible for the people of their districts.

This order was modified in 1924 by the Pig and Deer Traps Ordinance to allow the setting up of traps in or on the boundaries of padi farms or cultivated gardens. The prohibition still applies to the jungle, the immediate vicinity of a dwelling house, the area adjacent to a public highway or bath and the area close to the bank of a river or stream. That ordinance has the effect of recognizing the right of an Iban to hunt in the jungle though he may not set traps. That was the position until 1947 when the Game Ordinance (Cap 35) was passed under which a licence is required to kill rhinoceros, orang-utan, long-nosed monkey, egret and nutmeg pigeon. But no licence was required for killing in self defence or defence of the crops or cultivation. There is also no prohibition against the hunting of other animals and birds. This means the Ibans could continue to hunt and kill all other animals and birds. This ordinance, as with the others, serve to declare the native customary rights of the Iban.

As for the collecting of jungle produce, I have earlier already adverted to some of the orders and concluded that they do not affect customary

native rights. Another one is O XIV of 1921 under r 11 of which it is expressly provided that any subject of the Rajah can cut and remove from state land any timber or other forest produce required by him for his own use and not for sale, exchange or profit. The Forests Ordinance (Cap 31) 1934 dealt specifically with forests and forest produce. Here again a specific provision for the protection of the native customary right is given and it is s 55(1) which says:

> Subject to s 32(d) and to any special conditions prescribed by rules made under this Ordinance, any native of Sarawak may cut and remove from land any timber or other forest produce required by him for his own use, and not for sale, exchange or direct profit.

Certain restrictions were imposed by the Forest Rules 1947 when it prohibits felling of certain species and of trees below certain girth except with the permission of the district officer. In view of the right granted under s 55(1) nothing turns on that fact that there is a provision to have a communal forest gazetted but it was not done. This ordinance was replaced by the Forests Ordinance 1953 but again there is a specific provision to protect native customary right and this is in s 65(1) which reads:

> Subject to para (d) of ss 36 and 57, and to any rules made under s 95, and to any order made under s 96, any inhabitant of Sarawak may, without licence or permit, cut and remove from State land which is not a forest reserve any timber or other forest produce required by him exclusively for his own domestic use and not for sale, barter or profit.

The various sections referred to do not do away with the right completely but only limit or reduce the extent, like prohibiting the taking (among others) of forest produce from protected forests and from using certain timber as fuel. The Forest Rules 1954 also do not abolish the native customary right of taking forest produce but only prohibits the taking of certain trees or the felling or injuring of trees for the purpose of collecting fruits or *damar*. The right to continue to take forest produce not covered by the said prohibitions therefore remains though quite a lot of that right was taken away without any compensation to the natives. That was during the rule of the Crown. The authority should, in view of *Adong*, ponder carefully when considering future legislation with regard to and which adversely affects native customary rights in view of art 13 of the Federal Constitution ('the Constitution') which states:

> Rights to property
>
> (1) No person shall be deprived of property save in accordance with law.
>
> (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

The authority must also take into account art 5(1) of the Constitution — which provides that: 'No person shall be deprived of his life or personal liberty save in accordance with law' — in view of the decisions in *Tan Tek Seng @ Tan Chee Meng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 and *Ketua Pengarah Jabatan Alam Sekitar & Anor Kajing Tubek & Ors and other appeals* [1997] 3 MLJ 323 that 'right to livelihood'

comes under this article since native customary right can be considered as a 'right to livelihood'.

Thus far, the native customary rights of an Iban to do the things associated with the terms *temuda*, *pulau*, and *pemakai menoa* have not been abolished. They have survived through all those orders and ordinances. It is not surprising given the attitude of the First Rajah which has been commented on by various authors. It has been said that though Sarawak was ceded to James Brooke and with it the proprietorship and sovereignty over the land, he had shown a consistent respect for native customary rights over land (see Anthony Porter — *The Development of Land Administration in Sarawak from the Rule of Rajah James Brooke to the Present Time* (1841–1965)). In fact, James Brooke had referred to native customary rights as 'the indefeasible rights of the Aborigines' (see John Templer — *The Private Letters of Sir James Brooke, KCB, Rajah of Sarawak*). James Brooke was 'acutely aware of the prior presence of native communities, whose own laws in relation to ownership and development of land have been consistently honoured' (see Anthony Porter, p 16).

In my view there is another obvious though unmentioned reason for not attempting to prohibit entirely native customary rights. During the reign of the Rajah he has to contend with rebellions after rebellions of various native groups and he was able to convince one group to go on war expeditions on his behalf against the other. The exploits of Munan Anak Minggat is an example (see Robert M Pringle's thesis on *The Ibans of Sarawak Under Brooke Rule 1841–1941*). If the Rajah had abolished all those rights he would have united all the natives and he would have a war against him by a united front made up of all the natives of Sarawak. His head would have been the trophy that would be sought, it being the custom of that time to take the head of an enemy. To put it another way, the Rajah cannot afford to abolish those rights given the ability of the like of Munan to lead his people.

This takes me to the first major legislation concerning land and it is the Land Order 1920 ('Order No VIII'). There, 'State land' is defined to mean 'all lands which are not leased or granted or lawfully occupied by any person and includes all lands which hereafter may become forfeited or may be surrendered to the State by the lawful owner thereof. It then went on to divide state land into: (a) town and suburban lands; (b) country lands of 100 acres and over; (c) country lands of under 100 acres; and (d) native holdings. Regulation 4 vests all rivers, streams and water courses to the Rajah. One provision concerning natives is s 22 which says:

> (i) Natives may occupy land free of all charges for the cultivation of fruit trees, paddy, vegetables, pineapples, sugar cane, bananas, yams and similar cultures in accordance with the customary laws provided that, where possible, claims to fruit groves and farming lands shall be registered. Records of such claims shall be kept by all native headmen and also in the land office in each district.
>
> (ii) A certificate in the form of Schedule A of Notification No of 1920 may be issued to registered land holders under this part.

By excluding from the definition of 'State land', land that was lawfully occupied and which a native had occupied under customary law is a continuation of the recognition of native customary rights. But it was argued that native customary rights can only be recognized if there are specific written laws that recognize them and there is none. What did the Rajah meant when he used the term 'customary laws' in Order No VIII? Mr Tan referred to the Land (Classification) (Amendment) Ordinance 1954 which defines the term to mean 'a custom or body of customs to which the law of the colony gives effect' which is a definition of 1954 which cannot be used to define the term used in 1920 in Order No VIII. The explanation of Porter at p 18 is closer to the meaning of that term, viz.:

> At the time of James Brooke's arrival in Sarawak there had for centuries been in existence in Borneo and throughout the eastern Archipelago a system of land tenure originating in and supported by customary law. This body of custom is known by the generic term 'Indonesian adat'. Within Sarawak the term 'Adat', without qualification, is used to describe this body of customary rules or laws; the English equivalent is usually 'Native customary rights'. Where these rights relate to land the expression used may ordinarily be either 'native customary tenure' or 'native customary rights over land'; …

That explanation accords well with the ordinary meaning of customary law which is that it is a practice of the people of a particular place. It is a practice by the habit of the people and not by the dictate of the written law. This is what is known to the Rajah as the customary law of the natives which he had not attempted to change except for the instances set out in the orders which I have already discussed. The Rajah, as can be seen from the orders and ordinance and from the fact that he did nothing to totally abolish their practice, had consistently honoured native customary rights even though it was not in written form. Therefore, I am of the view that there is substance in what Porter said at pp 19–20:

> The importance of honouring customary rights and law had been realized by Brooke before his arrival in Borneo. The progressive accretion of territory and authority in Sarawak did not affect the basic principle of non-interference with customary rights and whenever it proved necessary to mention customary rights in land legislation specific protection was usually given. From the beginning Brooke's assumption of sovereignty and presumption of proprietorship in land was burdened by the recognition of customary rights; no scheme or alienation or development was ever introduced except in respect of land over which no rights had been established. In the Land Regulations of 1863, the first important item of land legislation, provision was made for the alienation only of 'unoccupied and waste lands, the property of government'. In his first attempt at the introduction of a Code of laws Brooke declared that Chinese immigrants were allowed to settle but could not govern or interfere with the Malays or Dayaks and could not take land already occupied.

Therefore, the Rajah recognized this customary law and that it has the meaning I have earlier mentioned. If necessary, another apt description of native customary right would be that used to describe native title in *Mabo (No 2)* (1992) 175 CLR 1, 335, which is that 'it has its origin in and is given its content by the traditional laws acknowledged by and the traditional

customs observed by the indigenous inhabitants of a territory'. It is therefore not dependent for its existence on any legislation, executive or judicial declaration (*The Wik Peoples v Queensland* (1996–1997) 187 CLR 1, at p 84) though they can be extinguished by those acts. Therefore, I am unable to agree with Ms Gau that native customary rights owe their existence to statutes. They exist long before any legislation and the legislation is only relevant to determine how much of those native customary rights had been extinguished.

Order No VIII was supplemented by Order IX of 1920 which is reproduced here:

Order No IX, 1920

SUPPLEMENTARY TO LAND ORDER NO VIII, 1920

Land Regulations

THESE regulations are issued under s 15 of the Land Order of 1920 and shall come into force at a date to be notified subsequently in the Government *Gazette*.

2 (i) Native land reserves shall be made in suitable situations and these shall be divided into lots of three acres and any native born subject of His Highness the Rajah shall be permitted to occupy one such lot free of all charges (excepting fees for demarcation) provided that no person not being a native of the Country shall occupy land in such reserves and further that no one person shall occupy more than one lot at one and the same time.

(i) A record of the names of those occupying land under this section shall be kept by all *Tuai Kampong* and also in the Land Office in each district.

(ii) A certificate in the form of Schedule A may be granted to each native land holder on application.

3(i) Land in certain localities shall also be reserved for cultivation by squatters and shall be divided into lots of five acres or less to be held under squatters license as provided for in the land Order of 1920.

(ii) No one person shall hold more than five acres of land as a squatter and any person or persons, firm or firms, becoming possessed of more than five acres of squatters land by any means, either by purchase or foreclosure of mortgage or in any other manner, shall pay the premium which would have been payable if such lands had been taken up under a lease in the first instance and this shall in no case be less than $1 per acre.

4 Squatters licenses shall be in the form of Sch B.

Though there is no record of the present claim of the plaintiffs being registered, it does not follow from the non-registration that such rights can no longer be claimed. Those provisions do not concern the native customary rights that have been exercised over land, including land which a folk can traverse in half a day which means involving hundreds of acres and not just the few acres to which Order IX relates. Here again, there is no express provision to say that native customary rights hitherto enjoyed by the Ibans will no longer be recognized or that they are each to be confined to

the several acres of land mentioned in Order IX. Therefore, the native customary rights that existed continued to be recognized.

Continued recognition to native customs was given by Order l–4 of 1928 when it made provision for regard to be had for native customs and local condition when importing the Law of England.

The Order No VIII was replaced by a 1931 Order (Land Ordinance (Cap 27)) ('Cap 27 Ordinance') which defines 'Crown land' differently, viz: 'all lands for which no document of title has been issued …' But there is no mention that native customary rights can no longer exist if no title had been issued. If it was the intention to abolish native customary rights which existed long before the arrival of the Rajah there must be clear words to that effect but there was none. Given the Rajah's intention to protect the natives, it is inconceivable that it was intended by Cap 27 Ordinance to completely wipe out the native customary rights of the Ibans. Therefore, Crown land it may be but it is nevertheless subject to native customary rights. The relevant provisions of this Cap 27 Ordinance are these:

CHAPTER 27
L A N D

To consolidate the law relating to land.

Part I
GENERAL

2 The provisions of this Ordinance shall be retrospective, unless the context of any section clearly indicates a contrary intention:

Provided that, except as is herein specially otherwise enacted, nothing in this Ordinance shall affect the past operation of laws relating to land previously in force, or the validity or invalidity of anything done or effected, or of any right, title or interest created under those laws, before the commencement of this Ordinance.

(2) In the event of any inconsistency appearing between any of the provisions 9f Part I, II, III, IV, V, VI, VII, X or XII of this Ordinance and any of the provisions of Part VIII, IX or XI of this Ordinance the latter shall prevail. (Ord No 8/1949)

LAND

'Crown land' means all land for which no document of title has been issued but includes all land which may become forfeited or may be surrendered to the Crown by the lawful owner thereof; Crown land also includes

(i) the bed of any river, stream, lake or watercourse, and

(ii) the foreshore and beds of the sea within the territorial limits of the Colony;

'Cultivate' means to tend in such a manner as to promote the growth of a planted crop;

……

……

5 The entire property in and control of Crown land and all rivers, streams, canals, creeks and watercourses throughout the Colony is and shall be vested solely in the Crown.

A .....

30 (1) No one whether a native or otherwise may without documentary title, acquire a title to land by squatting on it or on any part thereof or exercising acts of ownership over it, and anyone so doing may be required to vacate the land without payment of any compensation even though he may have squatted on the land or exercised acts of ownership over it for twelve years and upwards

B Temporary Occupation Licence

30A (1) Subject to the provisions of this Ordinance and any rules made thereunder, the Superintendent may permit the temporary occupation of Crown land under licence.

(3) A person occupying Crown land under a licence under this section shall

C not by reason of such licence or such occupation acquire any title to the land described in the licence.

NATIVE HOLDINGS

'Free' Land (Pesaka)

90 (1) In addition to land which may be held under ordinary document of

D title subject to the usual incidents of tenure, and in addition to the native communal and customary tenure of land (if any) sanctioned by virtue of s 91 for Malay kampongs and native houses and natives individually, any native being a male adult or a widow, spinster or divorced wife without male supporters, may on application to the Superintendent acquire under a lease for a term of 99 years one parcel of approximately three (but not more than

E four) acres of land free of all charges under this Ordinance:

Provided that

(a) the parcel shall be cultivated and no crop other than foodstuffs and traditional native products shall be planted.

.....

(2) Parcels and undivided shares in parcels under this section may be

F inherited by natives according to custom, ...

.....

NATIVE COMMUNAL RESERVES

91 (1) Native land reserves may be made in the discretion of the Superintendent by demarcation for the communal use of Malay kampongs

G and native houses, and natives may also occupy land individually by customary tenure, in both of which cases no ownership of the land shall vest in the natives and in which only such crops as padi, vegetables, pineapples, sugar-canes, bananas, yams and similar cultures shall be planted. Such reserves shall not be subdivided and shall be occupied free of all charges, and shall be in addition to the native holdings permitted under s 90. Where

H possible, claims to fruit groves and farming lands shall be registered. Records of such claims where possible shall be kept in the Land Office in each district.

(2) All reserves constituted under this Ordinance shall be notified from time to time in the *Government Gazette*.

SAGO LAND

I 93 (1) Land of unlimited area suitable for the cultivation of sago may be occupied and owned by natives, provided that sago is actually and consistently cultivated thereon, subject to the following conditions:

(a) the owners or occupiers of all sago land, whether already owned or occupied at the date of the coming into force of this Ordinance or subsequently thereto, if not already surveyed, must apply to the Superintendent for demarcation and registration. Such demarcation and registration, and when effected, survey, will be free of charge to the native.

.....

Unlawful occupation.

108 Any person who shall be found unlawfully occupying any Crown land or land reserved for a public purpose either by residing or by erecting any house, hut or other buildings thereon; or by clearing, enclosing or cultivating any part thereof or cutting timber or produce thereon or who shall directly or indirectly abet the commission of such act by any other person, shall be guilty of an offence against this Ordinance, and shall be liable on conviction before a Magistrate, to a penalty not exceeding two hundred dollars or, in default of payment thereof, to imprisonment for a term not exceeding six months.

It can be seen from s 2 that native customary rights continued to be recognized since native customs would come under 'the past operation of laws' which is that when the Rajah first took over Sarawak it was subject to native customary rights and which native customary rights had since been the subject of declarations by the orders and ordinances which I have referred to. As for s 108, an Iban occupying land pursuant to native customary rights cannot be said to be unlawfully occupying Crown land. In *Sepid Anak Selir v R* (1954) SCR (1954–55), four persons were charged under this section at a time when the Land (Classification) Ordinance No 19 of 1948 (as amended in 1952 and 1954) ('Ordinance 19') was in force and which created, among others, a category of land known as Interior Area Land to which natives may occupy for the purpose of creating customary rights. They were acquitted since they cannot be said to be unlawfully occupying Crown land. In my view, for the reasons I have already stated, a person cannot be guilty of an offence under s 108 independently of Ordinance 19, if the land was occupied pursuant to native customary rights which s 2 of the Cap 27 Ordinance expressly recognized. Neither can he be charged for felling or removing timber. The other sections do not have the effect of abolishing native customary rights.

Native customary rights continue to be recognized with the passing of the Land Settlement Ordinance the relevant provisions of which are :

Land Settlement Ordinance (Cap 28) (22 Jun 1933)

1 (1) ....

(2) On the coming into force of this Ordinance in any areas the provisions of the Land Ordinance (Chapter 27) and all rules made thereunder shall be deemed to have been repealed in such area.

(3) Nothing except as herein specially otherwise enacted shall affect the operation of the Land Ordinance (Chapter 27) or of any rule made thereunder or the validity or invalidity of anything done or suffered, or of any right, title or interest created thereunder before the coming into force of this Ordinance.

3 (1)Land for the purpose of this Ordinance is divided into the following classes:(a) town lands; (b) suburban lands; (c) country lands; (d) native communal lands.

.....

4 The entire property in and control of Crown land and all rivers, streams, canals, creeks and water courses throughout the Colony is and shall be vested in the Crown.

5 (1) After the coming into force of this Ordinance all alienated land situate within the limits stated below adjoining the sea coast, navigation rivers, streams, canals or creeks and existing roads shall be reserved to the Crown, and no one may acquire a title, except a lease of not more than one year's duration, to the same or any part thereof either as a squatter or otherwise without the permission in writing of the Governor in Council:

(a) all land within one chain (sixty-six feet) of high water mark along the sea coasts;

(b) all land within one chain (sixty-six feet) on each side along the banks of all navigable rivers, streams, canals or creeks; Provided that in the case of streams, canals or creeks whose width is half a chain or less the reserve on each bank may be twice the width of the stream, canal or creek;

(c) all land within half a chain (thirty-three feet) from the centre of all existing roads on each side thereof.

.....

13 (1) Whenever it appears expedient to the Governor in Council that a settlement of the rights in land in any area and registration thereof shall be effected the Director shall publish in the Government Gazette a Settlement Notification.

.....

23 (1) The Settlement Officer shall investigate publicly all claims to land.

.....

25 (1) All rights to land in any settlement area which are not established by any claimant and registered in accordance with the settlement shall belong absolutely to the Crown.

NATIVE HOLDINGS

66 Native customary rights shall be recognized in respect of —

(a) land planted with fruit trees, when the number of fruit trees amounts to twenty and upwards to each acre;

(b) land that is in continuous occupation or has been cultivated or built on within three years;

(c) burial grounds or shrines;

(d) usual rights of way for men and animals from rivers, roads, or houses to any or all of the above.

67 (1) Claims to land based upon native customary rights shall be heard and decided by Settlement Officer in the course of settlement.

...

70 ...a native...may, on application...acquire under a lease for a term of 99 years one parcel of approximately three (but not more than four) acres of land free of all charges under this Ordinance.

This legislation (regarded as legislation because all orders are by virtue of the Interpretation Order No 1–1 of 1933, to be so regarded) restricts the creation of native customary rights to only those created by the methods mentioned in s 66. But there is a saving provision, which is s 1(3), for rights already created. Here again if it was intended by this legislation to totally eradicate native customary rights unless created in the manner spelt out in s 66(a), (b) and (c), then the legislation should say so but did not. It would be out of character of Rajahs to have done so as they have recognized and respected native customary rights and they do not think they would want a revolt by a united native front.

The Land Settlement Rules 1934, were made under the Cap 28 Ordinance. Of relevance are rr 69 and 71 which say:

> 69 (i) Native customary rights held under s 66(a) and (b) shall be surveyed and recorded.
>
> (ii) No rigid examination of the proof of title to customary rights under these headings is either necessary or desirable. The primary object of settlement is to induce the native to settle on the land.
>
> .....
>
> 71 Areas for which customary rights held in common are established should be surveyed and recorded in the Land Register in the official designation of the headman 'as trustee.' Such areas are not transferable and no title should be issued.

The areas claimed by the plaintiffs had not been so surveyed and recorded in the land register (and also not as a native communal land under r 19 of the Land Settlement Rules 1951) even though one of the aims of the Cap 28 Ordinance was to record and protect the native customary rights as is stated in the Secretariat Circular No 12/1939 ('the circular') in these words:

> It is the aim of the Government to record and protect these customary rights and to prevent the various communities from impoverishing themselves by disposing of their rights to others. It is realized that *only proper land settlement* can satisfactorily accomplish the recording of Native rights.'

Here again, it is my view and for the same reason as I have said earlier the non-registration does not mean the non-recognition of existing native customary rights. Though the Cap 28 Ordinance was meant to register those rights, unfortunately this was not done. The then government recognized the absence of a code of native customary rights and in 1939, as a prelude to an attempt to resolve the problem, issued the Circular. The Circular opened with the following statement which recognized the existence of native customary rights, viz:

> The Land Orders recognizes native customary rights to land but give little guidance on the subject:

The Circular then went on to state that the natives follow certain customs, viz:

(I) The right to cultivate cleared land vests in the community with priority to the heirs of the original feller of big jungle. This right must

be exercised in accordance with a cycle compatible with the preservation of the maximum fertility of the land (and no longer) by methods of cultivation within the reach of the community. The cycle is, in their eyes, not a matter for rule of thumb but for expert native opinion.

(II) Where not inconsistent with the above, the existence of permanent cultivation of a reasonable density is evidence of customary ownership as opposed to customary right of user.

(III) Individual ownership is limited by the customary right of the community to a say in the matter of disposal to anyone outside the community.

(IV) No community or individual may hold up land in excess of requirements and, the extreme case, removal to another district automatically extinguishes all rights of the user. The old Order (ie Fruit Trees Order 1899(12)) dated 10 August 1899 is an excellent exposition of this principle.

The circular calls for the establishment of a Village Council for each community whose duties were:

> 10 The duties of a village council will be:
>
> (a) To enquire into and record the limits of land over which members of the community claim customary rights.
>
> (b) To advise officers in all matters concerning land which may affect the community and in due course to represent the community at the time of land settlement.
>
> (c) To approve or disallow all proposed voluntary dealings in land by members of the community subject to the usual right of appeal.
>
> (d) To advise the probate officer in all inheritance cases involving the transmission of land.

In so far as the enquiry and record of the limits of the customary rights are concerned, these were not carried out because 'according to Ansin (in Sibu) the Land Office was afraid there would be no land left to alienate if the demarcations were complete.' (See Richards on *Land Law and Adat*, p 11) despite what the Circular enjoins in the following paragraph:

> 12 Administrative Officers will arrange to hold meetings to hear the report of each Village Council on the extent and limits of the land claimed by communities. In some cases the area claim will be out of proportion to the requirements of the community and pruning or extension will be necessary. Room for normal expansion must be provided and suitable boundaries adopted. Where possible natural boundaries should be followed, but in congested areas artificial boundaries will be necessary.

So, it can be concluded that the non-registration was due to the fear of the power of that time that registration would result in large areas of Sarawak being claimed by the natives of Sarawak. Therefore, the plaintiffs cannot be faulted for the non-registration of the *pemakai menoa* under r 71 nor for the lack of survey record in the land register.

Other paragraphs of the circular give an insight of native customary rights by stating the problems that may arise and they are stated in these terms:

> 13 Streams are indisputable boundaries; unmarked watersheds invariably cause trouble when the time comes for survey; 'rentis' are unsatisfactory unless they can be demarcated and surveyed without delay. It is recommended that, in all cases where artificial boundaries are necessary and the Lands and Survey Department cannot undertake survey within a few months, marks of a type that appeals to the community should be established at intervals. Such marks could take the form of clumps of bamboo or sago, possibly re-inforced by pak or cairn to the natives' own taste. Any form of mark is better than none and will minimize disputes when the time comes for demarcation and survey. It is thought that in the first instance assistance by surveyors would be undesirable as the natives might conclude that Government had assumed responsibility and would cease to make genuine efforts to arrive at satisfactory definitions.
>
> 14 When boundaries have been agreed (mutually in the case of contiguous communities) they will be recorded by District Officers in the form of descriptions. A copy of the description will be given to the Village Council and the District Officer will emphasize the fact that the area so described is that over which the community concerned has acquired or may acquire customary rights in accordance with native adat. The Lands and Survey Department will co-operate to sketch these areas on District Officers' maps and they will become (immediately in Mixed Zones and Native Areas) Native Communal Reserves under the Land Orders. Additions to such areas will be permitted only on application and on proof to the satisfaction of the District Officer that additional farming land is necessary because of increase in the population or for other good reasons. This should have the effect of educating the native to marked and recorded boundaries and to his responsibility for their maintenance.
>
> 15 Provision will be made in the Land Orders for the partition of Native Communal Reserves and the issue of individual title, but action will not be taken without extensive deliberation and due regard for the state of evolution and needs of the community concerned.
>
> 16 It is impossible to settle boundary disputes equitably without visiting the site and inspecting the land. Even then it is not difficult to make a mistake, particularly when the dispute is over farming land and arises from the breaking up of a longhouse. All boundary disputes involving natives will be referred back to the Village Councils (for it is they who really know the facts) and Government will not intervene until all that can be done by the natives for themselves has been done. It is probably inevitable that in most cases a portion of the boundary will remain to be settled by Government after the Village Councils have done their best. Once settled, such boundaries as cannot immediately be demarcated and surveyed will be marked and recorded as described in para 14.
>
> 17 Communities, particularly in localities where old jungle is becoming scarce, should be encouraged to define and maintain forest areas of reasonable size, not for commercial purposes and not for potential farming land, but to provide for their needs in the way of jungle produce. These areas will also help to provide against denudation and the consequent evils, erosion and change of climate. The rules governing

these Communal Forests will be similar to those governing Protected Forests and the necessary legislation is being drafted. The main points are that the Village Council will be responsible for the internal administration of its Communal Forest and will ensure that no one but a member of that community works the produce. The District Officer will ensure that the produce is not used commercially and, with technical advice from the Senior Forest Officer, that the forest is properly conserved and not worked in such manner as to impair its usefulness for the purpose for which it was constituted.

18 It is thought that in the case of some tribes advantage could be taken of adat to increase the popularity of this measure. Village boundaries are useful as seed-forests and the custom of dedicating an area of forest, (The Iban 'Karong Glit') to the memory of a famous individual could be encouraged. It may be necessary to persuade a community to accept a Communal Forest in a locality which is unpopular and the idea would no doubt be a large block of forest subdivided for the needs of a number of communities. Except in densely populated localities and localities where land settlement operations are in progress it is unlikely to be possible to demarcate and survey Communal Forests, so the method of marking and recording boundaries described in para 14 should be adopted.

The circular also serves to confirm the continued existence of native customary rights by its detail reference to the matters pertaining thereto. The legislation and document referred to thus far do not contain any provision that wipe out native customary rights that existed before the passing of the legislation. Therefore if they have existed before, they continue to exist.

In 1941, the Rajah wanted to end his autocratic rule and he did this by giving Sarawak a constitution and a government. He issued Order No C-21 (Constitution) 1941. Under this order the power to legislate is still vested with the Rajah but he has to act 'with the advice and consent' of the Council Negri, a body of 25 members consisting of official and unofficial members, with members of the civil service making up the official members. A previous Council Negri that existed from 1936 was abolished with the repeal of the 1936 Order. Much of the harmony and the efficiency of the state public service in Sarawak which we see today is without doubt due in part to the vision and wisdom of the Rajah which are set out in the following words in the then Constitution of Sarawak, viz:

LET THE CARDINAL PRINCIPLES of the Rule of the English Rajahs as set out hereunder therefore ever be remembered —

1 That Sarawak is the heritage of our subjects and is held in trust by ourselves for them.

2 That social and educational services shall be developed and improved and the standard of living of the people of Sarawak shall steadily be raised.

3 That never shall any person or persons be granted rights inconsistent with those of the people of this country or be in any way permitted to exploit Our subjects or those who have sought Our protection and care.

4 That justice shall be easily obtainable and that the Rajah and every public servant shall be freely accessible to the public.

5 That freedom of expression both in speech and writing shall be permitted and encouraged and that everyone shall be entitled to worship as he pleases.

6 That public servants shall ever remember that they are but the servants of the people on whose goodwill and co-operation they are entirely dependent.

7 That so far as may be our subjects of whatever race or creed shall be freely and impartially admitted to offices in our service, the duties of which they may be qualified by their education, ability and integrity duly to discharge.

8 That the goal of self-government shall always be kept in mind, that the people of Sarawak shall be entrusted in due course with the governance of themselves, and that continuous efforts shall be made to hasten the reaching of this goal by educating them in the obligations, the responsibilities, and the privileges of citizenship.

9 That the general policy of our predecessors and ourselves whereby the various races of the state have been enabled to live in happiness and harmony together shall be adhered to by our successors and our servants and all who may follow them hereafter.

It is obvious by those declaration, and particularly by the declaration against exploitation, that it was never the intention of the Rajah to do away with the way the Ibans and other natives have lived their lives and exercised their native customary rights. It was a heritage, that is a custom, which they have declared to have held in trust for the people of Sarawak and, therefore, it was meant to be passed on from generation to generation.

This takes me to the new era, the period Sarawak came under the rule of the British Crown in 1946 when it became a colony. In 1946, the Third Rajah was of the view that 'it is in the interests of the inhabitants of Sarawak' that the territory should be ceded to 'His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, His Heirs and Successors'. For that purpose and on 21 May 1946 the Third Rajah signed the Instrument of Cessation which I reproduce here:

> Treaties and Engagements
>
> (GN 113 of 1946)
>
> INSTRUMENT OF CESSION of the State of Sarawak by His Highness Sir Charles Vyner Brooke, GCMC, Rajah of Sarawak, acting with the advice and consent of the Supreme Council of Sarawak, to His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India.
>
> … … …
>
> WHEREAS His Highness Sir Charles Vyner Brooke, GCMG, is lawfully Rajah of the State of Sarawak:
>
> AND WHEREAS by an Agreement dated the fourteenth day of June, 1888, the State of Sarawak was placed under the protection of Her late Majesty Queen Victoria:
>
> AND WHEREAS His Highness the Rajah, acting with the advice and consent of the Supreme Council of Sarawak, has determined that, in the interests of the inhabitants of Sarawak, the State of Sarawak should be ceded to His

Majesty the King and thereafter form part of His Majesty's dominions, which cession has been authorized by an order dated the eighteenth day of May, 1946, enacted by the Rajah with the advice and consent of the Council Negri of Sarawak, and entitled Order No C-24 (Cession of Sarawak) 1946:

AND WHEREAS Christopher William Dawson Esquire has been authorized by His Majesty to accept on his behalf the said cession:

NOW THESE PRESENTS WITNESS

1 The territory of the State of Sarawak, and the full sovereignty and dominion over the State, are hereby ceded by the Rajah, acting with the advice and consent of the Supreme Council of Sarawak, to and accepted on behalf of His Majesty, His Heirs and Successors, as from the date on which this Instrument comes into operation (hereinafter called the date of cession), to the intent that the State of Sarawak shall thereupon become part of His Majesty's dominion

2 There are hereby transferred to His Majesty, His Heirs and Successors, as from the date of cession, the rights of the Rajah, the Rajah in Council, and the State and Government of Sarawak in all lands and buildings including the Astana, but subject to existing private rights and native customary rights, and all the other property rights and assets of the State and Government of Sarawak, including the funds and securities of the Government, whether within or outside Sarawak; and all things necessary to give effect to such transfer shall be done.

3 All persons who immediately before the date of cession are employed in the service of the Government of Sarawak will be continued in their employment by His Majesty on terms not less favourable than those obtaining before the date of cession save that they shall hold office at the pleasure of His Majesty; and His Majesty accepts liability for the payment of any pensions gratuities and other like benefits due to be paid after the date of cession to any person or to his dependents in respect of service with the Government of Sarawak.

4 This Instrument shall come into operation on such date as by virtue of an order made by His Majesty in Council Sarawak becomes part of His Majesty's dominion:

Provided that His Majesty shall from the date of execution of this Instrument have full power and authority to make provision for the Government of Sarawak, such provision to take effect on or after the date of cession.

IN WITNESS WHEREOF His Highness Sir Charles Vyner Brooke, GCMG, Rajah of Sarawak on his own behalf, and Christopher William Dawson Esquire on behalf of His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, have signed the present instrument and have affixed thereto their seals; and the seal of the Supreme Council of Sarawak has been affixed thereto, by the authority of the Council and in its presence.

Done at Kuching, Sarawak, the twenty-first day of May, 1946.

CV BROOKE,

Rajah (LS)

CW DAWSON (LS)

[Supreme Council] (LS)

The Rajah, held true to their respect for the natives and customs even to the last day of their rule when they include a provision in that instrument to

protect the 'existing private rights and native customary rights'. This provision was respected by the Crown when it passed the legislation called the Land (Classification) Ordinance 1948 which I briefly touched on earlier. It is reproduced here

COLONY OF SARAWAK

No 19 of 1948

I assent,
CN ARDEN CLARKE,
Governor and Commander in Chief.
7 December 1948

An Ordinance to declare the law governing certain classification of land in Sarawak and to make provision for the transfer of land from one class to another.

[1 January 1949]

Enacted by the Governor of Sarawak with the advice and consent of the Council Negri:

1 This Ordinance may be cited as the Land (Classification) Ordinance 1948, and shall come into operation on January 1, 1949.

2 In this Ordinance —

'documentary title' includes any document conveying title to land issued under the provisions of the Land Ordinance or the Land Settlement Ordinance, or the rules made under either, and any document conveying title to land issued before the commencement of the Land Ordinance, and any mining lease issued under the law for the time being regulating mining;

'non native' means any person who is not a native of Sarawak as defined by the Interpretation and General Clauses Ordinance.

3 (1) All land in Sarawak belongs to one of the following five classes
(a) Mixed Zone Land;
(b) Native Area Land;
(c) Native Customary Land;
(d) Reserved Land;
(e) Interior Area Land.

(2) A parcel of any class of land referred to in sub-s (1) of this section may occur in any locality which substantially consists of land of another class.

4 Except as is provided by the law for the time being regulating prospecting for minerals, including mineral oils, or the taking of forest produce, a non-native may not acquire any rights whatever over any Native Area Land, Native Customary Land or Interior Area Land, and any contract purporting to confer any such rights on a non-native shall be void: Provided that if a non-native is in lawful occupation of Native Area Land immediately prior to the commencement of this Ordinance he shall be entitled to receive such notice to quit as he would have been entitled to receive if this section had not been enacted.

5 (1) Any of the following land, which has not been declared to be Native Area Land or Interior Area Land under subs (2) of this —, is Mixed Zone Land

a Land lawfully held, but not necessarily occupied, by a non-native on January 1, 1949, by virtue of a documentary title;

b Land lawfully charged to a non-native, the charge still subsisting on January 1, 1949, and having been registered in accordance with the Land Ordinance or the Land Settlement Ordinance and the rules made under whichever of those Ordinances applies;

c Land lawfully leased or sub-leased to a non-native for a period exceeding one year, the lease or sub-lease still subsisting on January 1, 1949, and having been registered in accordance with the Land Ordinance or the Land Settlement Ordinance and the rules made under whichever of those Ordinances applies;

d Land which has been declared to be Mixed Zone Land under sub-s (2) of this section.

(2) The Governor in Council may by notification in the Government Gazette declare any Native Area Land or Interior Area Land specified in the notification to be Mixed zone Land, and may so declare any unalienated Mixed Zone Land to be Native Area Land or Interior Area Land, and may from time to time in like manner vary or amend the description of the boundaries of any class of land specified in a notification issued under this subsection provided that the variation or amendment shall not affect the rights and conditions appertaining to any documentary title issued prior to the publication of such notification.

6 (1) Any of the following land is Native Area Land

(a) Land which was Native Customary Land until individual documentary titles were issued in respect thereof and which has not become Mixed Zone Land;

(b) Land lawfully held, but not necessarily occupied, by a native on January 1st, 1949, by virtue of a documentary title, and which is not Mixed Zone Land;

(c) Land which has been declared to be Native Area Land under sub-s (2) of s 5 or sub-s (2) of this section, and has not since been declared to be Mixed Zone Land.

(2) The Director of Lands and Surveys may, with the approval of the resident of the Division in which the land in question is situated, by notification in the Government Gazette, declare any Interior Area Land specified in the notification to be Native Area Land, any may in like manner vary or amend the description of the boundaries of any Native Area Land specified in a notification issued under this subsection provided that the variation or amendment shall not affect the rights and conditions appertaining to any documentary title issued prior to the publication of such notification.

7 (1) All land administered under s 91 of the Land Ordinance, or as communal land under rule 23 of the Land Settlement Rules published as Notification No 43 in the Government Gazette of January 16, 1934, as amended by Notification No 1410 published in the Government Gazette of October 1, 1940, is Native Customary Land.

(2) Land occupied by departments or officers of the Government of Sarawak, in their capacity as such, and land duly constituted, under the law for the time being regulating forests, as a Forest Reserve,

Protected Forest, or Communal Forest, and land to which Part XI of the Land Ordinance applies, and any other land duly constituted a reserve under any law for the time being in force, is reserved Land.

(3) Land which is not Mixed Zone Land or Native Area Land or Native Customary Land or Reserved Land is Interior Area Land.

8 (1) No person may occupy any Mixed Zone Land or Native Area Land unless a documentary title is still subsisting in respect of such land.

(2) No person may occupy any Native Customary Land or Reserved Land except as is provided by or under the law governing such land.

(3) No documentary titles shall be issued in respect of Interior Area Land and, except as is provided by the law for the time being regulating prospecting for minerals, including mineral oils, or the taking of forest produce, no such land may be occupied by any person except for the purpose of exercising native customary rights thereover. Natives who are in lawful occupation of Interior Area Land are licensees of Crown land and hold any rights which they possess in respect of such land at the pleasure of the Government.

(4) Any person who occupies any land in contravention of this section shall be deemed to be in unlawful occupation of such land for the purposes of the Land Ordinance or the Land Settlement Ordinance whichever is applicable.

9 (1) Nothing in this Ordinance shall affect the provisions of any other Ordinance relating to land except that it shall prevail over the Land Ordinance and the Land Settlement Ordinance to the extent of any inconsistency therewith.

(2) Nothing in this Ordinance shall operate to prevent the inclusion in a documentary title of special conditions restricting the right to transfer, charge or otherwise dispose of the land in respect of which the title is issued.

10 The rules specified in the Schedule to this Ordinance shall be deemed to be revoked.

SCHEDULE
RULES REVOKED

1 Rules 21, 22, 23, 24, 25, 26, 29, 30, and 31 of the Land Rules, 1933, published as Notification No 729 in the *Government Gazette* of December 1, 1933, and from time to time amended.

2 Rules 24, 25, 26, 27, 28, 29, and 30 of the Land Settlement Rules published as Notification No 43 in the *Government Gazette* of January 16, 1934, and from time to time amended.

Passed this thirty day of November, 1948.
RF MOLE,
Clerk of Council Negri.

It is clear that re-affirmation of native customary rights over land is given in s 8(3). It will be recalled that the disputed area falls within Interior Area Land and therefore native customary rights can continue to be exercised by virtue of this section. Therefore, the native customary rights claimed by the plaintiffs in the disputed area survived this legislation. This s 8(3) was amended in 1952 to read:

(3) No documentary title shall be issued in respect of Interior Area Land and, except for as is provided by the law for the time being regulating

> prospecting for minerals, including mineral oils, or the taking of forest produce no such land may be occupied by any person except for the purpose of creating native customary rights thereover.

This amendment has the effect of allowing natives to enter into Interior Area Land to create native customary rights like, for example, the performance of *panggul menoa* a ceremony employed in the process of creating a *pemakai menoa* which is an improvement on the original provision which allowed only the exercise of existing as against the creation of new native customary rights. It is significant that by the amendment of s 8(3) vide Ordinance No 10/1952 which came into effect on 18 June 1952 the natives no longer occupies the land 'at the pleasure of the Government' as that provision was removed. Instead s 8(2) was amended by including a provision that: 'Natives who are in lawful occupation of Native Customary Land are licensees of Crown Land.'

Then in 1954 the preamble was amended by adding, at the end of the sentence the words: 'and to make provision for defining the rights of natives and non-natives in such land'. Amendment was also made to include certain definitions, viz:

> 'customary law' means a custom of body of customs to which the law of the Colony gives effect;
>
> 'native system of personal law' means the customary law applying to any community forming the whole or part of any native specified in the First Schedule to the Interpretation Ordinance 1953;
>
> 'system of personal law' means the system of personal law recognized by the general law of the Colony as being applicable to the members of any racial, religious or other community because they are members of such community and includes any rules or customary law of such system which may refer the determination of any matter to another system of personal law.

Those provisions show that the Crown was aware of their obligation under the Instrument of Cessation to honour native customary rights.

Section 8(3), as well as (4), were replaced in 1955 by the following new subsections (and three additional subsections were also added but they need not detain our attention) and they read:

> (3) Without prejudice to any law for the time being regulating the prospecting for minerals and mineral oils or the taking of forest produce any native who without a prior permit in writing from a District Officer occupies any Interior Area Land or fells or attempts to fell virgin jungle upon any such land or attempts to create customary rights upon any such land shall be guilty of an offence: Penalty, for a first offence a fine of five hundred dollars or imprisonment for six months and for a second or subsequent offence a fine of five hundred dollars and imprisonment for six months.
>
> (4) The occupation of Interior Area Land by a native or native community without a permit in writing from a District Officer shall not, notwithstanding any law or custom to the contrary, confer any right or privilege on such native or community and in any such case such native or native community shall for the purposes of the Land Ordinance or the Land Settlement Ordinance whichever is applicable, be deemed to be in unlawful occupation of Crown land.

Those two provisions came into effect on the 16 April 1955. For the first time there is a prohibition against the creation of native customary rights in Interior Area Land unless there was prior written permission from a district officer. Existing native customary rights of the plaintiffs, which had been exercised since the time of the ancestors of the plaintiffs, that is before 1955, were not affected as those amendments were not stated to apply retrospectively. Again, it must be remembered that following the authorities I have already referred clear and unambiguous words in a legislation are required to abolish those rights and there is none of that. This is the convenient place to again mention *Nyalong v The Superintendent of Lands & Surveys Second Division, Simanggang* which was also cited for the proposition that the plaintiffs are mere licencees whose licence is terminable at will, citing the following paragraph of that case:

> It must be remembered that a person can be said to own land only if there is a Land Office title subsisting in the land and if no such title exists the occupier is a mere licensee of Crown Land.

While it is correct that the plaintiffs do not hold any title to the land and may be termed licencees but their licence, contrary to what Mr Tan had argued, cannot be terminable at will. Theirs are native customary rights which can only be extinguished in accordance with the laws and this is after payment of compensation. The other cases cited in relation to this point are *Ladang Tai Tak (KT) Sdn Bhd v Suppiah a/l Andy Thavar & Ors* [1999] 5 MLJ 257 and *Petronas Dagangan Sdn Bhd v Omar bin Abdul Samad* [1996] 4 MLJ 391 which are of no relevance to the present case as they do not concern the native customary rights of Sarawak which after the formation of Malaysia cannot be taken away without compensation. The description of native customary rights as 'licences' is ill fitting and this was clearly illustrated by *Richards*, at p 18, in these words:

> 20 The rights in Sarawak are not Easements, although there is some similarity, not because the people have no property in the and or rights over it but because they are a 'fluctuating class' in an ill-defined locality. Easements required clearly demarcated boundaries and definite possessors on either side. Even rights to take forest produce and to hunt do not fit with the English concept of *profit a prendre* because that also requires closer definition of the persons who possess the right than can usually be given here. The lack of precision in that case makes difficulties for the Forest Department but a right to hunt exists and could be called a mild form of occupation. Neither will 'licence' or 'permission' do to describe land rights. Permission is revocable at any time or expires by lack of renewal, and licence is 'a right of user not annexed to land'. Use of these terms would almost imply that no rights existed at all. Occupation of land without document or registration has been acquiesced in for so long, that title would appear to have been obtained by prescription to a large part of 'the bundle of rights'.

In 1955, the Native Customary Laws Ordinance was also passed, which preamble says — 'An Ordinance to make better provision in relation to native customary laws'. It merely empowers the Governor in Council to amend a native system of personal law if he is satisfied that the general

consensus of opinion in a community favours an amendment. It was pursuant to the powers given under this ordinance that the following orders, (among others) were made in 1958: (1) Tusun Tunggu (Third Division) Order, (2) Tusun Tunggu (Fourth Division) Order and Tusun Tunggu (Fifth Division) Order. Since the plaintiffs and their ancestors were or are residing in the Fourth Division of Sarawak, I will concern myself only with the Tusun Tunggu (Fourth Division) Order to see whether in any way it has affected the said native customary rights of the plaintiffs. This order made on 1 May 1957 reads:

Appendix VII

THE TUSUN TUNGGU (FOURTH DIVISION) ORDER
(Made under ss 3, 4 and 5)

[1 May 1957]

1 This order may be cited as the Tusun Tunggu (Fourth Division) Order.
[*Art 2 omitted by Commissioners of Law Revision*.]

2 That version of the Tusun Tunggu* in Dayak which has been printed by the Government Printer is hereby declared to be the native customary law for all Ibans resident in the Fourth Division in areas in which they are authorized to reside, and for all such other persons, cases and suits to which in accordance with the Native Courts Ordinance, or by virtue of any other written law, it may lawfully applied; and such version shall be the authorized persons.

3 The translation in English of the authorized version aforesaid, printed by the Government Printer under the title 'Sea Dayak (Iban) Fines Third Division (the revised version 1952)' and hereinafter referred to as 'the authorized translation', may also be used and referred to:

Provided that, in the case of any conflict between the authorized translation and the authorized version, the latter shall prevail.

4 The resident of the Fourth Division shall cause printed copies of the authorized version and the authorized translation to be made available to all Native Courts in his division before the specified date, and also as soon as conveniently may be, caused printed copies of the English translation to be delivered to such courts, public officers and persons as may reasonably require the same.

By this order the Third Division Sea Dayak Customary Code of Fines was applied to the Fourth Division and therefore that Code is applicable to the plaintiffs and their ancestors. This Code deals with offences relating to custom and fines, the various jurisdiction of a *tuai rumah*, of a *penghulu* and of a District Native Court. It has a guide for Judges, Magistrates relating to adoption and the acquisition and disposition of property. It does not contain any provision that adversely affect the rights of the plaintiffs. Neither was it intended to be an exhaustive statement as to all aspects of the native customary rights of the Ibans. On the contrary, there is one part there which bears testimony to the custom of a *temuda* and it is stated there this way:

> Theoretically all untitled land whether jungle or cleared for padi farming (*temuda*) is the property of the Crown. The fact that Dayaks do clear a portion of virgin land for the site of their padi farms confers on them a restricted right

> of proprietorship over the land thus cleared. Once the jungle has been cleared it becomes '*temuda*'. It is a recognized custom that '*temuda*' is for the use of the original worker, his heirs and descendants. This is the only way Dayaks can acquire land other than by gift or inheritance.
>
> In former days there were no restrictions on anyone felling jungle provided that he did not destroy valuable commercial trees such as gutta, *Jelutong* and *Engkabang*. But it is not so now. Since the introduction of the Forest and Erosion Ordinance no one is allowed to fell jungle without permission from the proper authority.
>
> No Dayak is allowed to sell, purchase or lease (by way of demanding rent either in kind or in cash) untitled land. It would be an infringement of the right of the Crown if they did so, and they may be prosecuted in view of the fact that selling of untitled land is prevalent in this division, and Dayaks seem to forget this custom.
>
> There are no other ways in which Dayaks can part with possession untitled land other than by gift or on death. When a Dayak abandons his land '*temuda*' and moves to another district he loses all his rights to it. The land that has been farmed by him reverts to the Crown (as legally it is Crown land) and it is usually set aside for the benefit of the general community or to help those who are otherwise lacking in land. In such a case the original owner has no right to prevent others from making use of the land and the user acquires the right.
>
> This was made clear by the Rajah's order dated 10th August 1899 Land Tenure Act, which states that, 'Any Dayak removing from a river or district may not claim, sell or transfer any farming ground in such river or district nor may he prevent others farming thereon unless he holds such land under grant.

But it was argued that absence of any reference to or mention of the terms *pulau* or *pemakai menoa* in the Tusun Tunggu meant that such custom was not native customary law since they do not come within the definition of 'customary law' of the Land (Classification) (Amendment) Ordinance 1954, viz.: 'a custom or body of customs to which the law of the Colony gives effect'. The following sentence of Richard, p.9, was referred to as supporting that view:

> As was pointed out by Mooney, as Crown counsel and Hickling, the law does not in fact give effect to any customs whatsoever except the codified law of the delicts.

The matters of *temuda*, *pulau* and *pemakai menoa* were already recognized by their being mentioned in the various orders and reference which I have earlier referred to and therefore the law of Colony has indirectly given effect to them. Native customary law before its codification was not in any legal written form but a matter of proof. Native customary law existed and operated side by side with the orders and other legislation of the Rajah until they were abolished by the Rajah (see Professor Douglas Sanders; *Calder; Adong bin Kuwau, Mabo*). Therefore, even assuming that those rights of *temuda*, *pulau* and *pemakai menoa* were not expressly mentioned by any written law, it does not mean that they could not exist as native customary law. They exist, and in this regard I have already adverted to the evidence and found them to exist, until abolished by orders or other legislation for which also I have concluded that they had not abolished those native customary rights which are also equated as native customary laws.

Reference was also made to the Native Courts Ordinance 1955, which was an 'ordinance to make better provision for the constitution of native courts; the definition of their powers and jurisdiction; and all matter ancillary thereto', and its successor the Native Courts Ordinance 1992 with the same preamble. However, there is no provision in either Ordinance to state that native customary rights like those claimed by the plaintiffs are abolished. Both these Ordinances have the same definition for 'customary law', 'native system of personal law' and 'system of personal law' as those of the amended Land (Classification) Ordinance 1948.

Those definitions were referred to for the purpose of arguing that the native customary rights claimed by the plaintiffs must have recognition by statutory law. The 'general law of Sarawak' referred to in one of the definitions mean not only statutory law but custom and usage as well and such include native customary rights that have existed before the rule of the Rajah and continued until now as I have said earlier. In this respect I regard as an accurate statement of the position of native customary rights the following statements of Pringle:

> There was no equivalent court for either Chinese or Ibans, but the customary law of both was recognized. As interpreted by Native Officers or community headmen, subject to the resident's discretion.
>
> The customary law (adat) of the various ethnic groups was the third foundation of the Sarawak legal system, the first two being common sense and a vague adherence to English legal principle. Like everything about the Government of Charles Brooke, acceptance of local adat grew quietly and naturally from his early outstation experience, reinforced by the theories of his uncle.
>
> ……..
>
> Down through the years Brooke's Court recognized and enforced Iban adat, but under the Second Rajah no attempt was made either to embody it in a written code, or to eliminate the variations which existed from river to river. It was apparently recognized that either course would tend to violate the subtle, flexible spirit of customary law.

That description of customary law which is the same as native customary rights form a part of the general law of Sarawak. Richard also correctly regarded that as part of the law when he said:

> That the customary law is alive and always changing; it lives by the spirit, and not by the letter. If it is put into the straight-jacket of statutory form it will perish or, if it lives, it does so by disregarding the statute.

Then in 1958, the Sarawak Land Code was enacted which was for the purpose of making 'better provision in the law relating to land'. Section 5 governs the creation of native customary rights in the following terms:

> 5 (1) As from the first day of January, 1958, native customary rights may be created in accordance with the native customary law of the community or communities concerned by any of the methods specified to sub-s (2), if a permit is obtained under s 10, upon Interior Area Land. Save as aforesaid, but without prejudice to the

provisions hereinafter contained in respect of Native Communal Reserves and rights of way, no recognition shall be given to any native customary rights over any land in Sarawak created after the first day of January, 1958, and if the land is State land any person in occupation thereof shall be deemed to be in unlawful occupation of state land and s 209 shall apply thereto.

(2) The methods by which native customary rights may be acquired are:

(a) the felling of virgin jungle and the occupation of the land thereby cleared;

(b) the planting of land with fruit trees;

(c) the occupation or cultivation of land;

(d) the use of land for a burial ground or shrine;

(e) the use of land of any class for rights of way; or

(f) any other lawful method:

Provided that:

(i) until a document of title has been issued in respect thereof, such land shall continue to be State land and any native lawfully in occupation thereof shall be deemed to hold by licence from the Government and shall not be required to pay any rent in respect thereof unless and until a document of title is issued to him; and

(ii) the question whether any such right has been acquired or has been lost or extinguished shall, save in so far as this Code makes contrary provision, be determined by the law in force immediately prior to the first day of January, 1958.

(3) (a) Any native customary rights may be extinguished by direction issued by the Minister which shall be:

(i) published in the *Gazette* and one newspaper circulating in Sarawak; and

(ii) exhibited at the notice board of the District Office for the area where the land, over which such rights are to be extinguished is situate,

and on the date specified in the direction, the native customary rights shall be extinguished and the land held under such rights shall revert to the Government:

Provided that where such rights are extinguished in pursuance of this section compensation shall be paid to any person who can establish his claims to such rights in accordance with paragraphs (b) and (c); or other land over which such rights may be exercised may be made available to him with or without the payment of additional compensation whether for disturbance, or for the costs of removal, or otherwise.

(b) Any person who desires to make any claim for compensation must submit his claim with evidence in support thereof to the Superintendent, in a form to be prescribed by him, within such period as may be stipulated in the direction issued by the Minister under paragraph (a), provided that the period so stipulated shall not be less than sixty days from the date of publication or exhibition thereof.

(c) No claim for compensation for extinguishment of native customary rights shall be entertained by the Superintendent

unless such claim is submitted within the period stipulated in paragraph (b).

(4) (a) Any person who is dissatisfied with any decision made by the Superintendent under sub-s (3) on the ground that:

(i) his claim to native customary rights has been rejected or not recognized by the Ssperintendent;

(ii) the allocation of land over which such rights are to be exercised, is inadequate or inequitable; or

(iii) the amount or apportionment of compensation is inadequate, unfair or unreasonable,

may within twenty-one days from the date of receipt of the decision of the superintendent, by notice in writing addressed to the superintendent, require the matter to be referred to arbitration in accordance with s 212.

(b) Upon receipt of the notice of arbitration, the superintendent shall direct that any compensation payable to the person who desires to have his claim or matter referred to arbitration, to be deposited in the High Court, pending the outcome of such arbitration proceedings.

1 The provisions of sub-s (3) shall apply whether the land over which the customary rights are exercised is required for a public purpose or the extinction of such rights is expedient for the purpose of facilitating alienation, but shall have no application to cases in which the Forests Ordinance, the National Parks Ordinance or any other written law, including Part V, makes other provision for the extinguishment thereof.

2 The Majlis Mesyuarat Kerajaan Negeri may make rules for the assessment of compensation payable for extinguishment of native customary rights under this section and s 15.

(7) Whenever any dispute shall arise as to whether any native customary rights exists or subsists over any state land, it shall be presumed until the contrary is proved, that such state land is free of and not encumbered by any such rights.

As with previous legislation, this one does not abrogate whatever native customary rights that exist before the passing of that legislation. This means the plaintiffs' native customary rights were unaffected by this legislation except that they can no longer claim new territory even though the families may increase unless they obtain a permit under s 10 of that legislation from the Superintendent of Lands & Surveys. The case of *Pang Cheng Lim v Bong Kim Teck & 3 Ors* [1997] 4 AMR 3717 which dealt with the Malacca Lands Customary Rights Ordinance and which held that if a person could not acquire any title under that ordinance he could not acquire it by any other method as that would defeat the purpose of that ordinance is of no relevance to the present case as it is not concerned with the question of whether native customary rights survived the various orders and legislation. Also of no relevance is the case of *Lebbey Sdn Bhd v Chong Wooi Leong & Anor* [1994] 3 AMR 2205 which concerns squatters on state land in Selangor of which this case is not and because there is no law in Sarawak to say that if you do not apply for a licence to occupy the land under s 30A of the Land

Ordinance or s 29 of the Land Code you will lose your native customary rights which you have hitherto enjoyed now and which your ancestors have enjoyed since the days of the Rajahs. Support for the view that whatever native customary rights that were acquired are not affected by the Land Code can be found in *TR Bujang Ak Untor v TR Tanjong Ak Usat* 4 MC 62 which is a decision made in 1966 where Lee Hun Hoe J (as he then was) sitting in appeal with two assessors held that *temuda* acquired prior to 1958 continue to subsist.

Ms Gau had contended that the fact that the plaintiffs did not lay claim to the Lands & Surveys Department for the disputed area before the disputed area was alienated to the first defendant is indicative of the fact that the plaintiffs knew they have no native customary rights over the disputed area as otherwise the Superintendent of Lands & Surveys could have considered their application under s 18 of the Land Code. That section says:

> Where the superintendent is satisfied that a native has occupied and used any area of unalienated state land in accordance with rights acquired by customary tenure amounting to ownership of the land for residential or agricultural purposes, he may issue to the native a grant in perpetuity of that area of land free of premium rent and other charges.

It is clear that the section only applies to land occupied for residential or agricultural purposes whereas the plaintiffs' claim in respect of the disputed area is not only for agricultural purposes but also for the right to the forest produce, to hunt and to fish. Though under the Land Settlement Ordinance, there is provision for registration it was the authority, as I have earlier already commented on, which failed to carry out the exercise. In any event the failure to register or obtain a title does not abolish any native customary right.

Ms Gau then contended that there was no requirement for an enquiry before land is alienated even though s 15 of the Land Code provides that State land shall not be alienated until all customary rights therein have been surrendered or extinguished or provision has been made for compensating the persons entitled to such rights. Nevertheless, she submitted, the administrative investigation consisting of examination of aerial photographs taken of the disputed area, is sufficient for the officer concerned to decide that there was no native customary rights. No field investigation was done and I have already commented on the inadequacy and unsatisfactory nature of such evidence for deciding on whether native customary rights exist in the disputed area. Nothing can take the place of physical inspection of the disputed area as it will provide definite clues of the activities carried on there and the examination of the trees will reveal their age. Alienation of land after the arbitrary decision of an administrative officer as to the absence of native customary rights in an area and which decision is based on examination of photographs is in my view against the enjoin of s 15 against alienating such land without first satisfying either through extinguishment or compensation of native customary rights because that provision can only be satisfied if the claimant is heard before a decision is taken. In the present case, the title is

issued even before the plaintiffs were heard. It is against the rule of the right to be heard. Perhaps, Sarawak should take a leaf from the Sabah Land Ordinance where s 13 provides:

> Upon the receipt of any application for unalienated country land it shall be the duty of the Collector to publish a notice calling upon claimant to native customary rights in such land who is not yet in possession of a registered documentary title to make or send in a statement of his claim within a date to be specified in the notice. If no claim is made the land shall be dealt with as if no such rights existed.

Even though there is no such explicit provision, and as I have earlier concluded in relation for the need to hear claimant as regards extinguishment or compensation for native customary rights, I expect the authority to call for claim to native customary right before issuing the title pursuant to an application for land or else you will get confrontation between the rival claimants because the only way the claimant to native customary right will find out is when the bulldozers move in after the title was issued and the claimant would take them as trespassers in violation of their native customary rights since the title was issued without their knowledge.

Then came the formation of Malaysia in 1963 where 'Law' has been defined by the Malaysian Constitution to include 'custom and usage having the force of law' which again reaffirm the continued existence of native customary rights.

This leads me to consider whether the Majlis Adat Istiadat Sarawak Ordinance 1997 has any effect on those native customary rights of the plaintiffs. This Ordinance was passed 'to provide for the establishment of a Council (to be known as the Majlis Adat Istiadat Sarawak) to advise the Yang di-Pertua Negeri on all matters relating to the customary law and adat of the various natives of Sarawak other than Malays or natives who profess Islamic religion and for matters connected therewith and incidental thereto.' The preamble describes it all and this Ordinance does not purport to deal with the legal position of existing native customary rights. A council is established to advise His Excellency, the Head of State of Sarawak, on matters of customary law and adat of non-Muslim natives and non-Malay. It does not eliminate the native customary rights exercised by the plaintiffs.

Then in 1993, which is some years after Sarawak together with other states come together to form Malaysia on 16 September 1963, the customs of the Iban were codified and this code is known as the Adat Iban 1993. This code was derived from the 1952 revised version of the Sea Dayak Customary Codes of Fines for the Third, Fourth and Fifth Divisions and this 1952 version was in turn derived from the 1936 version. I have already dealt with the position of the Tusun Tunggu and why, in my view, it did not abolish the said native customary rights. It remains to be examined whether the Adat Iban 1993 which is governed by the Native Customs (Declaration) Ordinance 1996 (which replaced the Native Customary Laws Ordinance 1958) changes that legal position. Section 7(1) provides that the Adat Iban shall be 'conclusive as to the customs of the native race in respect of which

it was compiled and its correctness shall not be questioned in any court whatsoever. If a provision of the Adat Iban is repugnant or inconsistent with any written law, the written law shall prevail (see s 9). Mr Tan's argument is that because the term '*pulau*' is not mentioned in the Adat Iban nor in the Tusun Tunggu, it means that 'this practice is not in accordance with the customary law'. For that argument to succeed it must be shown that there are provisions in the Adat Iban to say that unless a custom is mentioned in it, such a custom is no longer to be recognized or regarded as a native customary right. There is no such provision because it was not so intended. This is clear from the words in s 7(1) that where the Adat Iban states that where a particular custom is stated it is deemed to be correct. As was said earlier, there must be clear unambiguous words to that effect if it was intended that the native customary rights that had existed since before the time of the First Rajah and that had survived through all the orders and legislation were to be extinguished. Not only that there are no such words, neither were there any words that can possibly give rise to such an inference.

Mr Tan had also referred to several authorities, namely, *Nyalong v The Superintendent of Lands & Surveys Second Division, Simanggang*; *Abang v Saripah* [1970] 1 MLJ 164; *Ara bte Aman & Ors v Superintendent of Lands & Mines, 2nd Division*, for the proposition that because the term *pulau* or *pulau galau* is not mentioned in those cases, they suggest that there are no such native customary rights. This proposition can be dismissed by saying that those cases were not concerned with *pulau* or *pulau galau* nor were they concerned with whether they survived the various orders and legislation; therefore, they are not relevant.

Those cases were cited also for the proposition that native customary rights can be lost when abandoned or when the native moves to another Division or to another district which is under a different *penghulu*. This matter of *pindah* was elaborated by the defendants' own witness Penghulu Utong to mean that it has to do with the intention of the person to leave the village and never to return. He said that a person who studies overseas for five years or a person who works 15 years in Kuching is not considered to have *pindah*. What, then, are the evidence to suggest that the plaintiffs have abandoned and *pindah*? Mr Tan did not point to any evidence that tend to support though much time was spent by him in eliciting evidence from the various plaintiffs as to their occupation and residence in the various towns, none of which can be said to be evidence of abandonment or *pindah*. His own witness Penghulu Utong Ak Sigan said those occupation and residence of the plaintiffs cannot amount to *pindah* or *abandonment*.

As for the presumption under s 5(7) of the Land Code — 'whenever any dispute shall arise as to whether any native customary rights exists or subsists over any state land, it shall be presumed until the contrary is proved, that such state land is free of and not unencumbered by any such rights' — I am of the view that the plaintiffs had succeeded in displacing it through the evidence which I had already gone through.

Mr Tan had gone through the evidence for the plaintiff with a fine tooth comb and highlighted every single discrepancy that can be found in the evidence. I do not propose to mention them but suffice for me to say that

none of them can have any impact on the conclusions I have to make. As I said earlier, discrepancies are always to be expected and I do not find them to be material. I prefer the hard evidence like the presence of *tembawai* and the longhouse where you can expect lives to revolve around them and the various activities relating to *temuda* and *pulau* are expected to be carried out within the *pemakai menoa*. I am prepared to go as far as to say that if you find a longhouse with a sizable number of families in a remote area, you must expect the activities of hunting, fishing, gathering of forest produce and farming to have been carried out. You can expect them to have been carried out within an area surrounding the longhouse that can be covered by a half-day foot journey unless delimited by the presence of another longhouse in the vicinity. It then becomes only a question of delimiting the extent of the perimeter of the *pemakai menoa*.

It was also submitted that the plaintiffs were motivated by greed in commencing this action after failing to get payment of RM135,000 for the purpose of performing various ceremonies and for the damage to the *pulau*. Whatever the motive, if the plaintiffs have a right they can seek vindication of that right in court. It has no bearing on the facts and law of this case. Neither do I consider that as being 'unclean hands'.

Regarded as 'unclean hands' was the fact that the plaintiffs disagreed as to the meaning of 'development' which Mr Tan had argued as meaning economic and job opportunities. Counsel had submitted that the plaintiffs did not want to work and did not contract to plant and maintain trees. But the question then is at what wage? They are asked to be labourers of the second defendants which cannot be better than the plaintiffs farming their own *temuda* or getting a job for the same pay without the strenuous toil or doing their own business like selling gas. If they have refused, they have the right to do so and I do not see how such conduct of the plaintiffs can be regarded as reprehensible as to debar them from obtaining any relief from the court. Similarly the plaintiffs cannot be faulted for demanding RM23,000 per acre in respect of the trees that had been felled from the disputed area. Do not forget that it is not only this generation of the plaintiffs that stand to lose the benefits that could be derived from the forests but the generations yet to come and preservation of these forests become even more important when after 1958 no new native customary rights can be created. It remains to be seen whether the bond of the Ibans with the land, the jungles and the rivers can survive or be broken by the eventual crowding as a result of the growth of the population of a longhouse because there cannot be any more expansion of the *pemakai menoa* though the families of the longhouse may increase. When you take this factor into consideration the RM100,000 plus demanded is just peanuts. The way of the Ibans is that the forest produce is to be exploited for their own use and not for sale. This situation can easily be exploited by merchants bribing them to accept what can be considered as token sums to give up the timber in the forest. It is illegal but then again in the face of licences being granted to timber concessionaires over areas which the Ibans claim native customary rights, what option do the Ibans have than to reap as much as possible from their capitulation. The Ibans can easily be persuaded to give up their rights

in the face of licences issued to fell timber and titles to land being issued to farm the land. From what I have learned from this case *tuai rumah* can easily be tackled by the merchants to let logging be done for what is comparatively a pittance. When money is paid or demanded as a result, I do not see how I can condemn the plaintiffs. This problem of the exploitation of the timber is not new as it is the subject of the following comment by Richards, at p 26:

> The existence of this community right in the area of disposal leads to difficulties with sawmills and their logging licences. Ibans are prone to demand 'royalty' or to try and sell the right to the timber which they say is theirs. They even go so far as to obtain an agricultural title from the Land Office which they will keep till they have sold the timber from the land and then abandon it. They state their case too strongly. They have rights to products they can use and to game within their area, and they have as good a right as anyone else to take part in the logging industry, but they cannot show the capital necessary. They only claim the standing timber because of the boundary setting of 25 or more years ago but there is no reason why their other rights should be disregarded and arbitrarily destroyed by somebody's decision to grant a timber licence. The Maias Protection Commission referred to the Dayaks' 'indisputable and unquestionable rights to hunt', and said 'it would be neither politically nor morally sound to deprive them of it'.

Mr Tan then contended that since the younger Ibans usually work in town 'the purpose of preserving the *pulau galau* for future generations would be redundant since these young people and their offspring are unlikely to go back to reside at their longhouse as they would have their own house in their place of work'. Learned counsel, with all due respect, has very little knowledge of life in Sarawak. Go to any place where menial work has to be performed and you will find natives doing them. They form the majority of the very low income group. One cannot fail to see that after a short stay in Sarawak. How in the world such workers can afford to own a house is beyond my comprehension. With their wages, they cannot even afford to rent a room unless in a squatter colony. I have these years been hearing divorce matters and inevitably when they involve the natives, they do not even have money for their own upkeep let alone care for the child or children. It is in situation like this that thankfully there are the grandparents in the longhouse to turn to for the care and up-keeping of the children after the marriage broke up. In fact for a lot of cases, even before the marriage broke up the child or children are looked after by the grandparents while the couple worked in the city. These couples usually have low level of education, thus putting it beyond their reach the ability to earn enough money as to eventually buy a house. It is so important that when things fall apart there is still the longhouse to go back to and which is home. One development which the natives living in longhouse require is that education be easily accessible to them so that they can attain a level of education that enable them to earn an income higher than learned counsel's expectation of them, which is that of an uneducated labourer. Another development is that the children and their parents must be made to realize that their future lies in obtaining a good education. Those are the development which will uplift their standard of living of the Ibans, not the development of plantations which demand a ready supply of cheap labour. I must quickly add that if the

Ibans themselves chose to provide the cheap labour, so be it. Where employment is concerned, the natives must be given a choice to be labourers or a better paying job and that choice can only be available if they have easy access to education like the urban children. It is in situation like this that I marvel at the ability of countries with a vast area and with the population spread out like, for example, Australia years ago, where the children are educated at home or at certain outposts over the radio without having to travel miles and miles to schools. I have to stop here as it is not within my purview nor within my ability as to how the problems of the Ibans with regard to the education of their children can be solved; that I leave to the legislators.

Mr Tan's clients had not finished with their startling outlook for the life of an Iban. He said, following his contention that the Ibans would have earned money by working, they could buy whatever they can get from the forests and there is no need for access to the forests for that purpose. Learned counsel is wrongly assuming one thing for this contention and that is the supposition that all Ibans would be able to earn enough money to buy whatever necessities that they can obtain from the forests. The Iban society like all others have different stratum, from the very poor to the very rich. If learned counsel is referring to the rich or very rich Iban, then perhaps he is correct in saying that the Ibans do not need to maintain forests to gather those produce since they can buy them easily. Can that be true of the poorer Ibans? Let us take the example of an Iban in Kuching earning RM500 a month, which is a figure I learned from the many divorce cases I have heard that a person can earn when his level of education is low. Let us say the wife has no job because she has to look after two school-going children. That family would be living below the 1997 Sarawak poverty level of RM543 (RM584 for 1999) (see Table 3.2, p 58, of the Eight Malaysia Plan 2001 – 2005). Even a hundred or two more would still be close to the poverty line. Life is a struggle for them with insufficient money for the purchase of necessities. Worst of all, they would not have a home. Therefore, they still need the longhouse to go home to and the native customary rights to farm, fish, hunt and gather forest produce. Without the longhouse and its *pemakai menoa*, the economically poor Iban living in the urban area would be destitute. For the economically poor Ibans, they will greatly need the *galau* or *pulau galau* for the forest produce and animals, the river for the fish and the *temuda* for farming and fallow if they are not to be vagabonds in their own land. As for the rich Iban, Mr Tan appears to suggest that they should forget about their heritage but that is against what everyone knows is the accepted practice of 'going home' (commonly known to Malaysians under the Malay term '*balik kampong*'). Going home means going back to our root and Ibans are no different. Though they are rich, they will still go home to the longhouse and when you have a longhouse along with it comes the native customary rights exercisable in its *pemakai menoa*. Therefore, it matters not the slightest that there are Ibans who are rich because wealth does not take away their native customary rights unless they chose to by *pindah* or abandonment. It must not be forgotten what Richards had stated in p 37, viz:

> Government, as princes before, offers to grant rights to individuals, whether it be the right to take timber or to make a plantation, without reference to the community or group. This is looked upon as an arbitrary diminution of the community's right effected by might, and not by right and justice. The logical outcome is that there will be nothing for the community right to work on at all: the community will lose its value as a cohesive and disciplinary force and will disappear, leaving the mass of individuals who will have no roots, no traditions, no beliefs and no livelihood except they will suffer a miracle of adaptation. There have been instances in Malaya and in other countries, as well as in Sarawak, of whole communities disappearing, even literally dying out, in contact with lop-sided and rapid 'development'. Where they cannot adapt fast enough, the only benefit 'in the sense that they are better dead'.

While still on the subject of 'development' which was brandished about both in and outside the court while the case was being tried, it will do well for the people of Sarawak to learn from the Sabah experience. You should ask yourself why Sabah with so many large plantations of trees, of cocoa and of oil palm is now the second poorest state in Malaysia. You should also ask why Sabah attracts so many illegal immigrants and whether the numerous very huge plantations requiring cheap labour is their magnet. I am not saying they are since I do not have the statistics and it is a matter for the legislators to look into. But large plantations will demand a ready supply of cheap labour which at the moment citizens of our neighbouring countries are providing. Fortunately for those countries these labourers will go home skilled in works relating to the plantations and will be more productive when they undertake the same work in their countries as compared to a new recruit imported by Malaysia from those countries. Malaysia, particularly Sabah, has been training these workers for so many years now that those countries have a ready supply of such skilled labour. Therefore, unless we have our own cheap labour supply it would be difficult to compete with the other countries at least in the aspect of productivity on account of their experienced workers, experience obtained while working in Malaysia. It will not be possible to ensure a continuous supply of cheap Malaysian labour if the populace is getting better and better education since a higher paid job comes with better education. It must be remembered also that immigrant workers come with a hidden cost. They strain our medical facilities by swelling the population. It is almost inevitable that the spouse somehow or rather will find their way to join the husband. Then come the births that put more strain on the medical facilities. When you want to deport the workers and other illegal immigrants that have strayed, it would be very expensive since the legal process would take a bit of time to go through before a person can be deported. In the meantime, it costs at least RM35 per day just to maintain a detained illegal immigrant. This reminds me of my days in Tawau when the prison told the courts that there is no more room in the prison. In the end, the authority could no longer afford to arrest the illegal immigrants and they were left to roam. Then came the idea of detention centres which cost, I should think, no less than the sum I have mentioned to detain one person there. Still you have the problem of transporting these illegal immigrants back and that also cost a lot of money. Add on to these woes the home countries have to be satisfied that these people are their

nationals which is no easy task since, take for example in Sabah, the illegal immigrants have no documents. If the home countries take a month for verification, imagine the cost per person. It is always difficult to trace a worker whose work pass has expired and that is while, I would venture to assume, the figure of illegal immigrant population keeps rising. The natives of Sabah are now suffering from the large presence of illegal immigrants. Giving those facts, I hope the Government of Sarawak will give it some thought as to how they can avoid those problems that Sabah now face if a policy of procuring overseas cheap labour is pursued. Foreign labour will have to be relied on since the local populace, as is the policy of the government, will be better educated as time goes by and thus alleviate them from the cheap labour market to better pay jobs that come with better education. It would be a pity should Sarawak suffer the same fate as Sabah. At the moment, at least to me, Sarawak, when compared to Sabah, is Utopia.

That is not all the surprises because Mr Tan also said that the plaintiffs and their families despite the disputed area being worked over by the second defendant 'are not only surviving, but prosperous enough to travel down to Kuching' and observe the court proceedings for the duration of the trial. Though it matters not to the issues before the court but that statement shows how the first and second defendants sometime work and think under delusions, such as the instant example of equating someone as being prosperous just because he can make it down to Kuching from a longhouse. That is an absurd measure for wealth. That attitude is of no surprise to me after all they have regarded providing a job that pays a sum near the poverty line as being very charitable to plaintiffs which they should not have refused. They should be reminded of the global attitude towards natives and for this purpose I need only refer to the draft declaration on the Human Rights of Indigenous Peoples which declares the right of the natives to maintain their cultural characteristics, viz:

> Art 4
>
> Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Other articles of this draft declaration provide valuable insight as to how we should approach matters concerning the natives, viz:

> Art 7
>
> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
>
> a Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
>
> b (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
>
> c Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

d Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

e Any form of propaganda directed against them.

Art 8

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.

Art 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right.

Art 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Let me quickly add that the draft declarations play no part in my decisions on the issues in this case since they do not form the law of our land. It is reproduced to show how wrong the attitude of the first and second defendants are towards the natives of Sarawak; more so when the natives are supposed to enjoy the special position envisaged by art 161A of the Constitution.

There are other cases referred to the court but I have considered them though I do not mention them specifically but they are all irrelevant to this case for the reasons that they do not concern the issues as those of this case; neither were they involved in consideration of whether native customary rights that have existed before the arrival of the first Rajah to Sarawak have survived all the orders and legislation. Neither, for the same reason, is the principle of 'physical possession or dominion' relevant.

To sum up, the plaintiffs' right of *temuda*, *pulau* and *pemakai menoa* had survived all the orders and legislation. They were exercised in the disputed area by the plaintiffs and their ancestors until they were prevented to do so by the total destruction of the trees by the defendants for the purpose of planting pulp trees after the issuance of the titles by the third defendant to the first defendant.

The counterclaim of the first and second defendant

If I am wrong in my conclusion and instead there should be judgment for the second defendant I am nevertheless of the view that the second defendant as well as the other two defendants have not suffered any damage. The second defendant's claim for the various sums, which I will not bother to set them out, are dependent on many factors of which no evidence was adduced. As for the increased planting costs in the disputed area which planting was held up as a result of the action of the plaintiffs, it presupposed that after the planted trees had been exhausted, there would be no need for further replanting. There is no evidence of that. This means that the disputed area can be planted with trees at the same time when that

re-planting is done for the other area. Therefore, there is no question of added costs. The other assumption was that the second defendant would run out of pulp as a result of the failure to plant the disputed area with trees and this entails added cost in sourcing alternative material which contention is dependent on the supposition that whatever the mill churns out will sell like hotcakes with no need for any scaling down in the production and therefore in the reduction in the harvest of the trees. Is there then evidence that the second defendant had contracts lined up in which they have to meet the demands for papers? There is none. In fact the first harvest of the trees does not take place until 2004. There is no evidence that there would be insufficient pulp on account of orders that had been received and that had to be met. Furthermore, there is no evidence to show that the second defendant could not have planted in other part of the huge tract of land so as to mitigate what they have failed to plant in the disputed area. Therefore, if judgment is to be given to the defendants it will be to the first and second defendants for trespass but with an award of RM10 to peg the costs which I would award to the defendants against the plaintiffs. Having provided for the contingency, I now turn to consider the orders I should grant to the plaintiffs.

The remedies

As the plaintiffs are entitled to exercise native customary rights over the disputed area there will be and I do make a declaration that the plaintiffs are entitled to exercise native customary rights in the disputed area. Since the first and second defendants are not entitled to enter into the disputed area there will be an injunction against them and their servants or agent not to do so from henceforth. As for damages claimed, there is insufficient evidence to support the award of any sum and I therefore make no order for damages. Consequent upon my findings, the title issued to the first defendant which included the disputed area is declared void and I expect the third defendant to take the necessary steps to rectify the title so as to exclude the disputed area from the grant and the disputed area is to be reckoned by reference to the map admitted in evidence as P172, following as closely as possible the boundary of the disputed area that has been marked on the map. There will be costs to the plaintiffs against all the defendants.

Order accordingly.

Reported by Ezatul Zuria Azhari